Student No: V00602354 Date of Birth: 08-JAN Date Issued: 22-JUL-2014
EXPR

Record of: Mackenzie Clark Badger Page: 2
Level: Undergraduate

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:					
Spring 2013					
Humanities and Sciences					
History					
Continuing					
FREN 201	INTERMEDIATE FRENCH	3.00	B	9.00	
HIST 319	HISTORY OF ENGLAND	3.00	B	9.00	
HIST 391	TOP: WRLD OF ALEXANDER THE GRE	3.00	A	12.00	
HIST 391	TOP: ABORIGINAL AUSTRALIANS	3.00	B	9.00	
MILS 302	MILITARY SCI &LEAD: LEAD &ETHC	3.00	A	12.00	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts:		51.00	GPA:	3.40	
Good Standing					
Summer 2013					
Humanities and Sciences					
History					
Continuing					
HIST 391	TOP: CARIBBEAN HIST & CULTURE	3.00	A	12.00	
HIST 391	TOP: THE ATLANTIC SLAVE TRADE	3.00	A	12.00	
STUA 015	BARBADOS: ATLANTIC HIST & CULT	0.00	NC	0.00	
Ehrs: 6.00 GPA-Hrs: 6.00 QPts:		24.00	GPA:	4.00	
Good Standing					
Fall 2013					
Humanities and Sciences					
History					
Continuing					
FREN 202	INTERMEDIATE FRENCH READINGS	3.00	C	6.00	
HIST 361	AMERICANS FROM AFRICA	3.00	A	12.00	
HIST 493	INTERNSHIP	3.00	A	12.00	
Ehrs: 9.00 GPA-Hrs: 9.00 QPts:		30.00	GPA:	3.33	
Good Standing					
Last Standing: Good Standing					

********** CONTINUED ON NEXT COLUMN **********

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	62.00	62.00	229.00	3.69
TOTAL TRANSFER	72.00	0.00	0.00	0.00
OVERALL	134.00	62.00	229.00	3.69

********** END OF TRANSCRIPT **********

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Grades	Grade Points
A-Superior	4
B-Good	3
C-Average	2
D-Passing	1
F-Failing	0
FI-Incomplete Converted to Failing	0
DN-FN-Not figured in GPA	0

Grades not used in the computation of GPA

AU-Audit
CO-Continued
CR-Credit
H-Honors
HP-High Pass
I-Incomplete
M-Marginal
P-Pass
PR-Progress
W-Withdrawn
IM-Incomplete Military
WM-Military Withdrawn
S-Satisfactory
AB-Absent from exam (no longer awarded)
WF-Withdraw Failing (no longer awarded)
WP-Withdraw Passing (no longer awarded)
XA-Superior
XB-Good
XC-Average
XD-Passing
XF-Failing
XPR-Progress
XI-Incomplete
TR-Transfer
AP-Advanced Placement
IB-International Baccalaureate
PL-Placement Exam/Waiver
U-Unsatisfactory
RD-Repeated Course grade of D (no longer awarded)
RF-Repeated Course grade of F (no longer awarded)
NC-Administrative grade with no credit
NR/NG-Administrative grade assigned when no grade is submitted by the instructor

Abbreviation and Symbols
EHRS-Credit hours earned.
GPA-Hrs-Quality hours earned (all hours carrying grade points).
QPts-Quality points earned.
GPA-Grade point average (computed by dividing quality points by GPA-Hrs).
Transfer Credits-Universities and colleges from which students have transfer credits. Also included are advanced placement, international baccalaureate and special programs.
WI-Writing intensive course
E-Indicates that the course is excluded from earned hours and the GPA.

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June 03, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to offer my recommendation in support of Mackenzie Badger's application for the position of law clerk with your chambers. Mackenzie is an intelligent, diligent, and conscientious student, with a genuine intellectual passion for the law. I recommend him highly.

I met Mackenzie in his first year of law school, when he was a student in my Civil Procedure course. At the University of Florida College of Law (UF Law), Civil Procedure is taught in one semester as a comprehensive four-unit class that includes both jurisdiction and the Federal Rules of Civil Procedure. Despite the significant demands of the course—which covered both constitutional and procedural law, as well as policy and strategic considerations—Mackenzie's performance was consistently excellent. In a very large class of students, Mackenzie's contributions stood out among his peers.

In class, Mackenzie was well-prepared and engaged with the material, regardless of the day's topic. Without dominating classroom discussion, Mackenzie was an active participant in the conversation, willing to answer challenging questions and test his understanding.

On the exam, Mackenzie also excelled. His exam answers were well-organized and well-written, honing in quickly on the relevant facts and providing clear, efficient legal analysis that demonstrated a sophisticated understanding of the course material. He particularly shined in incorporating strategic and practical considerations into his analysis. Mackenzie's outstanding performance in the course placed him in the top 5% of the class overall, earning one of a small number of A grades among the 83 students in the course.

Moreover, Mackenzie was the most diligent student in the course, and among the hardest working law students I have encountered in my decade of teaching. He regularly went above and beyond in his studies, often discussing the day's topics with me after class or in office hours. When I posted past practice exams, Mackenzie was the only student to complete and discuss every one of them with me, to make sure he had mastered the material fully.

Notably, as I learned over the semester, Mackenzie's dedication to his studies is about much more than simply getting high grades. Mackenzie has had to overcome significant challenges to attend law school, and he has taken advantage of every opportunity to succeed academically while here. Mackenzie grew up in a very low-income family under difficult circumstances. Through his own determination, he attended community college, ultimately graduating from Virginia Commonwealth University with a 3.64 GPA. He also participated in ROTC there, which led to several years of public service work as a patrol officer and wildfire firefighter.

When Mackenzie decided to go to law school, he chose to attend UF Law based on financial considerations, as he was offered a Governor's Scholarship that covered his full tuition. Since arriving at law school, he has recognized both his own academic potential and his deep intellectual interest in the law. He performed incredibly well in his first year, finishing the year with the Book Award for the highest grade in his Criminal Law class and a 3.78 GPA overall, placing him in the top 5% academically of his 1L class. Throughout his second year, he continued to perform very well, remaining in the top 10% of his class despite a semester without letter grades due to COVID-19.

Mackenzie has also embraced opportunities to develop his legal research and writing skills, spending a summer working for Judge Dalton, taking a course with Judge Irick, and doing an externship with Judge Brannon. Not surprisingly to me, his interest in a federal clerkship comes from a genuine interest in the work, developed through experience, rather than a desire for achieving another feather in his cap.

I have no doubt that, if given the opportunity, Mackenzie would be a great asset to your chambers. I hope you will give him your highest consideration for the position.

Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Stephanie Bornstein
Professor of Law
University of Florida Levin College of Law

June 03, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to offer my strongest recommendation for University of Florida Levin College of Law student Mackenzie Badger, who is applying for a post-graduation judicial clerkship in your chambers. I met Mackenzie last year, when he was a 1L student in my Criminal Law course. I have had the pleasure to get to know him very well since that time – both in and out of class. Mackenzie is very impressive. He is not only as one of the sharpest legal minds in his class - but a kind person who is deeply interested in equal justice. I know that he will enrich any judicial chambers he joins. I hope that you will give his application the utmost consideration.

Mackenzie stood out to me right away as a student in Criminal Law (fall 2018). Each time I called on him in class, he was not only clearly prepared but very much up to the task of puzzling through any unknown hypothetical I might send his way. It was always a pleasure to watch him in action. He is a careful thinker who takes time to work through issues. It was clear that he enjoyed the give and take of solving legal questions in real time. More than this, I could always count on Mackenzie to move past the theoretical to offer grounded insights about the implications of the cases we were studying for individuals and communities. In the end, he received the highest grade awarded in Criminal Law and the "book award" for the course.

Mackenzie performed very well in two of my other classes, too. In my Problem-Solving Courts seminar (fall 2019), Mackenzie was one of my most engaged students. He dug deeply into the assigned readings and offered nuanced and sophisticated take-aways. His final paper – focused on challenges presented by drug treatment courts – could easily be converted into a publishable piece of scholarship. In Evidence (spring 2020), students did not receive a formal letter grade at the end of the semester because of our move to online learning due to COVID-19. But Mackenzie consistently stood out during in-class discussions. He was adept at puzzling through complicated hypotheticals and demonstrated tremendous skill in spotting and unpacking complex issues.

Allow me to further note that I have had the pleasure of teaching students at law schools across the country – including at Washington University in St. Louis and Georgetown University Law Center. I can honestly say that as a legal mind Mackenzie compares favorably with my top performers across the board. But Mackenzie is not only sharp – he is a concerned citizen, supportive colleague, and fine individual.

I have had the pleasure to watch Mackenzie engage with other students in a way that demonstrates true professionalism and collegiality. And although very bright, he never tries to one-up his peers or demean them. He consistently demonstrates self-awareness, humility, and good humor, never taking himself too seriously. Beyond all of this, it is clear to me that Mackenzie has worked very hard for every opportunity he has earned – and he takes nothing for granted. Your mentorship will mean the world to him.

Mackenzie Badger is truly one of my most favorite students. I know he will be a very talented law clerk and lawyer. If I can provide any additional information as you consider Quentin's application, please do not hesitate to contact me at 314.330.2245. Otherwise, thank you in advance for your careful consideration.

Sincerely,

Mae C. Quinn
Visiting Professor of Law

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To: [redacted]
From: Mackenzie Badger
Re: Habeas Petition Timeliness
Date: [redacted]

QUESTION PRESENTED

If a petitioner voluntarily withdraws his appeal from the Eleventh Circuit, does that qualify as final disposition for the purposes of a 28 U.S.C. § 2255 motion?

SHORT ANSWER

Likely not. Although Petitioner voluntarily withdrew his appeal from the appellate court, the Supreme Court may still review the withdrawn appeal. The disposition of a case is only final once the ninety (90) day window for certiorari expires, or the Supreme Court denies the certiorari petition. Once either of those condition take place, finality of the case is established. From that point, a petitioner has one (1) year to file a section 2255 motion.

PROCEDURAL HISTORY

Law enforcement began investigating Petitioner on [redacted]. (DE 1, 3). Law enforcement launched the investigation due to a tip they received. *Id.* The tip informed law enforcement that Petitioner sold drugs to an individual, and the use of those drugs resulted in the individual's death. *Id.* Undercover officers purchased drugs from Petitioner [redacted], from late [redacted] to [redacted]. *Id.* at 3-5.

After the undercover buys, law enforcement applied for, and received, a search warrant for Petitioner's home. *Id.* at 5. Law enforcement charged Petitioner with [redacted]. *Id.* Petitoner entered a plea of not guilty. *Id.*

On [redacted], Petitioner changed his plea to guilty. *Id.* Petitioner filed a notice of appeal on [redacted](DE 1). On [redacted], the Eleventh Circuit entered an order of dismissal due to

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Petitioner's motion of voluntary dismissal. (Cr DE 35) Petitioner filed this Motion to Vacate his sentence pursuant to 28 U.S.C. § 2255 on [redacted]—one year and twelve days after Petitioner voluntarily withdrew his appeal from the Eleventh Circuit.

DISCUSSION

For federal inmate's seeking post-conviction relief 28 U.S.C. § 2255 allows a one (1) year statute of limitations. The statute of limitations period begins to run from the latest of the following dates:

> 1. The date on which the judgement of conviction becomes final;
>
> 2. The date on which the impediment to making a motion created by government action in violation of the constitute or laws of the United States is removed, if the movant was prevented from making a motion by such government action;
>
> 3. The date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> 4. The date on which the facts supporting the claim or claims presented could have been discovered through exercise of due diligence.

28 U.S.C. § 2255(f)(1)-(4).

Title 28 of the United States Code Section 2254 allows a State inmate to seek post-conviction relief in federal court, as long as "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. §2254(b)(1). There is a one year limitations period for these motions, which begins to run, in pertinent part, "the date a judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." At issue is the meaning of "final" as it relates to 28 U.S.C. § 2255(f)(1) when a petitioner withdraws his appeal voluntarily.

A judgment is final "when it terminates the litigation between the parties on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined." *St. Louis,*

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Iron Mountain & S.R.R. Co. v. So. Express Co., 108 U.S. 24, 28 (1883). "Federal criminal defendants who do not file a petition for certiorari with [the Supreme] Court on direct review, § 2255's one year limitation period starts to run when the time for seeking such review expires." *Clay v. United States*, 537 U.S. 522, 532 (2003). "If a federal prisoner does not file a timely petition for a writ of certiorari after the disposition of his direct appeal . . . his conviction becomes final on the date on which the prisoner's time for filing such a petition expires, which is 90 days after the entry of judgment on direct appeal". *Mantecon v. United States*, 160 F. App'x. 948, 954 (11th Cir. 2005) (citing *Clay*, 537 U.S. at 532). When a defendant does not appeal, a judgment of conviction becomes final upon the expiration of time to file a direct appeal. *Akins v. United States.*, 204 F.3d 1086, 1089 n.1 (11th Cir. 2000). Although this language is clear in instances when direct appeals are denied, some circuits apply this language differently when a direct appeal is voluntarily withdrawn.

Courts within the Eleventh Circuit are split as to whether a petitioner is entitled to the 90–day period for certiorari petition before the limitations period for a 2255 motion begins when the original appeal to the circuit was voluntarily withdrawn.

Florida courts have not reached a consensus regarding whether a petitioner is entitled to the 90–day period for certiorari before the limitations period begins. The Northern District of Florida is split. The Southern District's view is that the case does not become final until after the 90–day period for certiorari has elapsed. The Middle District has not addressed the issue in a section 2255 context.

In *Adair v. Tucker*, 2014 WL 2805227 1, 2 (N.D. Fla. 2014) the defendant pled nolo contendere regarding his charges. The defendant was sentenced to community control, which he violated. *Id.* The defendant was sentenced on May 3rd, 1995, to a period of confinement. *Id.* The defendant appealed his conviction to the First District Court of Appeal but filed a notice of

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voluntarily dismissal. *Id.* The defendant's appeal was dismissed on February 28th, 1996. *Id.* Although the court did not reach a conclusion as to whether the 2254 motion was timely due to the extensive amount of time that passed from the voluntarily withdrawal to the 2254 motion, the court stated: "[T]he better reasoned view may be that the statute of limitations begins to run on the date the appeal is voluntarily dismissed." *Id.* at 3.

Conversely, the Northern District of Florida reached the opposite conclusion in *United States v. Reed*, 2011 WL 2038627 (N.D. Fla. April 4, 2011). In *Reed*, the defendant was arrested and pled guilty on December 17th, 2008. *Reed*, 2011 WL 2038627 (N.D. Fla. April 4, 2011). The defendant appealed on September 10th, 2009, but filed a motion to dismiss that appeal, which was granted. *Id.* The defendant filed a pro se motion to modification of federal sentence, which was adjusted to a section 2255 motion. *Id.* There was substantial difficulty in communicating with the defendant, but a proper section 2255 motion was received by the court on October 12th, 2010. *Id.*

The government in *Reed*, much like in the motion at bar, claimed the 90–day period for certiorari does not apply to the defendant because the defendant "would not file a petition for certiorari when he moved to dismiss his own appeal." *Id.* at 4. The court in *Reed* stated: "While this court agrees with the underlying logic of the Government's statement that a defendant should have no reason to file such a petition, this is not the *same* as saying that he is *legally foreclosed* from doing so." *Id.* (emphasis added). The court held that the defendant's conviction did not become final "until the ninety-day period for filing a petition for certiorari expired." *Id.*

In *Curry v. United States*, the defendant was sentenced on November 9th, 2005. 2014 WL 2859113 *1 (S.D. Fla. 2014). The defendant filed a timely notice of appeal on November 16th, 2005. *Id.* The defendant's counsel moved for the appeal's dismissal, which was granted by the

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Eleventh Circuit on March 27th, 2006. *Id.* The defendant then filed a 2255 motion on October 12th, 2012. *Id.*

The defendant contended that he was unaware that his appeal was voluntarily withdrawn. *Id.* Although the court did not need to come to a ruling as to whether the 90–day period applied when a defendant voluntarily withdrew his appeal, the court cited considerable sources from the Northern District of Florida that supported that premise, implying that it may be the more reasonable approach in the given circumstance. I*d.* at 5 n2.

There is no consensus in courts outside of Florida as to the right methods of calculating when the year–long period for filing a section 2255 motion begins when an appeal is voluntarily withdrawn. The government in the instant motion relies substantially on *Westmoreland v. Hetzell.* 840 F. Supp. 1275, 1277 (N.D. Ala. 2011). In *Westmoreland*, the defendant was convicted on May 15th, 2007, and sentenced on August 27th, 2007. *Id.* The defendant appealed his conviction. *Id.* While the appeal was pending, the defendant was resentenced due to a remand from the appellate court. *Id.* The defendant was resentenced on April 18th, 2008; the new sentence was fifteen (15) years less than his original sentence. *Id.*

During resentencing, "[defendant's] attorney announced that [defendant] 'wants to abandon and . . . is authorizing [counsel] to dismiss the appeal.'" *Id.* The defendant stated he wanted to dismiss his appeal based on his own decision and that he was "fully satisfied with the attorney's services." *Id*. The Alabama Court of Criminal Appeals dismissed the appeal on April 25th, 2008. *Id.* The defendant sought post-conviction relief for ineffective assistance of counsel on April 1st, 2009, which was denied. *Id.* The defendant then sought review of the denial on June 18th, 2010, which was affirmed. *Id.* He sought review of the Alabama Supreme Court, which was denied

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on November 12th, 2010. *Id.* The defendant filed a 2254 motion for post-conviction relief citing three claims of ineffective assistance of counsel on March 2nd, 2011. *Id.*

In the decision, the court reasoned that since

> [The defendant] never sought to reinstate the appeal, and he never raised any claim that his attorney rendered ineffective assistance in filing the voluntary dismissal or in otherwise failing to pursue the direct appeal, [the defendant] cannot now benefit from his deliberate choice to forgo a judgment on the merits from the state courts that would have enabled him to seek review in the Supreme Court.

Id. at 1279.

Other Circuits have not reached a consensus on the issue.

The Fourth and Fifth Circuits have held that a defendant filing a section 2255 motion is entitled to the 90–day window for certiorari when an appeal is dismissed, however, these circuits did not specifically identify those dismissals as voluntarily. *See United States v. Gentry*, 423 F.3d 600, 604 (5th Cir. 2005) (conviction became final ninety (90) days after the appellate court dismissed direct appeal; the basis for dismissal was not specified); *see also United States v. Sosa*, 364 F.3d 507, 509 (4th Cir. 2004) (conviction became final triggering one-year limitation period ninety (90) days after the court of appeals dismissed the defendant's direct appeal; the basis for dismissal was not specified).

The Ninth and Tenth Circuits have held that state petitioners are not entitled to the 90–day period for certiorari before the year-long limitations period to file a 2254 motion begins. *See, e.g.*, *White v. Klitzkie*, 281 F.3d 920, 923 (9th Cir. 2002) (The defendant's territorial conviction in Guam became final after the defendant dismissed his direct appeal prior to enactment of AEDPA); *Lee v. Klinger*, 2000 WL 216615 (Feb. 23, 2000) (the defendant's conviction became final on April

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20th, 1987, when the Oklahoma Court of Criminal Appeals dismissed the defendant's appeal on his own motion).

Looking to the Third Circuit for guidance has further proven unhelpful. *Compare United States v. Sylvester*, 2007 WL 4395652 (3rd Cir. 2007) (conviction becomes final and the limitations period begins to run when federal criminal defendant's appeal is voluntarily withdrawn, since further direct review in the appellate court is no longer possible when an appeal is voluntarily dismissed), *with United States v. Parker*, 416 F. App'x 132 (3rd Cir. 2011) ("There is no known precedent for the proposition that a criminal defendant who seeks voluntary dismissal of an appeal is foreclosed from filing a petition for certiorari challenging the dismissal (implying the defendant is entitled to the 90–day period)) *and Munsaisr v. United States*, 2018 WL 1446406 (D.N.J. 2018) ("The better rule, it seems to me, is that the limitations period begins to run 90 days after termination of a direct appeal, regardless of the manner in which the appeal was terminated").

The Seventh Circuit in *Latham v. United States*, 527 F.3d 651, 652 (7th Cir. 2008*)* held that a federal defendant is entitled to the 90–day period for certiorari to elapse before the one year limitations period begins to run for a 2255 motion. In *Latham*, the defendant filed a notice of appeal on November 14th, 2002, but then filed to dismiss that appeal, which was granted on May 1st, 2003. *Id.* Two weeks later, the defendant filed a motion to reinstate the appeal, claiming that his attorney misled him as to the consequences of dismissal. *Id.* After the defendant filed a 2255 motion, the government's position was that the defendant's 2255 motion was untimely because finality was attained when the defendant voluntarily dismissed his appeal, not after the period for certiorari had elapsed. *Id.* The Seventh Circuit disagreed, holding finality was attained in this case after the period for writ of certiorari expired. *Id.* at 653.

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"[C]ases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of *any party* to any civil or criminal, before or after rendition of judgment or decree." 28 U.S.C. 1254 (1)(emphasis added). The court reasoned any party—prevailing or otherwise—may file a writ of certiorari to appeal the decision of a court of appeals. *Latham*, 527 F.3d at 652. Even though the defendant prevailed by receiving a voluntary dismissal, by the language of § 1254, he was still entitled to review of that decision. *Id.* Since the defendant was entitled to review of the voluntary withdrawal of his appeal, he was also entitled to the 90–day period to file a petition for certiorari before the limitations period began. *Id.*

The holding in Westmoreland is contradicted by two cases from the Northern District of Florida.

In *Westmoreland*, the defendant voluntarily withdrew his appeal from the Alabama Criminal Court of Appeals on April 28, 2008, after being resentenced. *Westmoreland*, 840 F. Supp. 2d at 1278. Instead of continuing to appeal the merits of the defendant's case, The defendant filed a petition for post-conviction relief pursuant to Alabama Rule of Criminal Procedure 32 on April 1 2009. *Id.* at 1277. This petition was denied on September 4, 2009. *Id*. The defendant than sought review of that decision with the Alabama Court of Criminal Appeals, which affirmed the denial on June 18, 2010. *Id*. The defendant than sought review by the Alabama Supreme Court, which denied his petition of certiorari on November 12, 2010. *Id*. Finally, on March 2, 2011, the defendant filed a 2254 motion to the United States District Court of the Northern District of Alabama, seeking post-conviction relief. *Id*.

For the purposes of this case

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> A 1–year period of limitations shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of (A) the date on which the judgment became final *by conclusion of direct review* or the expiration of the time for seeking such review.

28 U.S.C. 2244 (d)(1)-(a) (emphasis added).

In addition, "[a]n application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. 2254. This analysis turns on when direct review reached conclusion or the time for seeking such review expired.

The defendant in *Westmoreland* voluntarily withdrew his appeal from the Alabama Criminal Court of Appeals on April 25th, 2008. 840 F. Supp. at 1277. The defendant then filed a petition for post-conviction relief on April 1st, 2009, almost one year after his appeal was dismissed on his own motion. *Id.* To answer the above question, deciding whether a petition for post-conviction relief is considered "direct appeal" or a "collateral review" or "collateral attack" is critical.

A collateral attack is "[a]n attack on a judgement in a proceeding other than a 'direct appeal.'" *Wall v. Kholi*, 562 U.S. 545, 552 (2011). "This usage buttresses the conclusion that 'collateral review' means a form of review that is not part of the direct appeal process." *Id.* "Our cases make it clear that habeas corpus is a form of collateral review." *Id.* Alabama Rule of Criminal Procedure 32 is a collateral remedy, not a direct appeal

Even if this collateral attack of the defendant's sentence tolled his period to file a 2254 petition, the defendant is far past his allotted one–year period. Defendant filed his first Rule 32 petition on April 1st, 2009, 342 days after he voluntarily dismissed his appeal. *Westmoreland*, 840

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F. Supp 2d. at 1277. Even if all of his other Rule 32 motions were filed the day the previous one expired, the period between his writ of certiorari and his 2254 motion would put him outside of the one–year period for filing from "[t]he date on which the judgement became final by the conclusion of direct review or the expiration of time to seek such review." 28 U.S.C. § 2244.

Aside from the issue of timeliness, the court reasoned the defendant never satisfied the exhaustion requirement, which states: "An application for a writ of habeas corpus . . . pursuant to the judgement of a State court shall not be granted unless . . . the applicant has exhausted all remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). In *Westmoreland,* the defendant failed to "exhaust all remedies available" because he withdrew his appeal and failed to file a direct appeal with the Supreme Court of Alabama. *Westmoreland*, 840 F. Supp 2d. at 1277. The holding that a state prisoner who fails to pursue all state level appeals is not entitled to a 90–day period to seek certiorari from the Supreme Court is directly contradicted by at least two cases from the Northern District of Florida.

In *Marshal v. Crosby*, the defendant was sentenced on August 28th, 2001. 2006 WL 568341, 1, 1 (N.D. Fla. Mar. 7, 2006). He was placed on five years of probation. *Id.* The defendant violated his probation, and on January 16th, 2003, pled nolo contendere. *Id.* On February 26th, 2003, the defendant "was sentenced to four and a half years of incarceration." *Id.* He appealed to the Florida First District Court of Appeals on August 25th, 2003, but filed a motion to voluntarily dismiss that appeal, which was granted on September 5th, 2003. He never appealed to the Florida Supreme Court, nor the United States Supreme Court. *Id.*

"It is now well established that when a Florida defendant directly appeals his conviction but does not seek certiorari review the one-year limitations period for filing a federal habeas petition begins to run ninety (90) days after issuance of the appellate court's decision." *Id.* at 2

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(citing *Nix. v. Secretary for the Dep't of Corrections*, 393 F.3d 1235, 1236–37 (11th Cir. 2004); *Bond v. Moore*, 308 F.3d 770 (11th Cir.2002)); *Jackson v. Secretary for the Dep't of Corrections*, 229 F.3d 1237, 1349 (11th Cir.2002)). Although the court found the defendant's 2254 motion untimely, the court clearly believed the most logical conclusion was to allow for the ninety (90) day window for writ of certiorari to expire before the limitations period began to run. *Id.* at 3. Three years later, the court revisited this same issue, and applied the same reasoning. *See Brandon v. McNeil*, 2009 WL 559530 (N.D. Fla. Mar. 4, 2009) ("court [concluded] that petitioner was entitled to seek certiorari review of his dismissed direct appeal and is therefore entitled to the 90-day grace period").

In *Westmoreland*, the court seemed to differentiate from the above two cases by explaining that in *Westmoreland*, the defendant, who was represented by the same counsel at trial and appeal, stated during his voluntary withdrawal that he was "fully satisfied" with his attorney's work. 840 F. Supp. 2d at 1277. If this is the differentiating factor between the two lines of reasoning, then the instant motion is more in line with the Northern District of Florida's decisions than the decision in *Westmoreland*.

The instant motion is more similar to *Reed* than it is to *Westmoreland*.

In *Westmoreland*, the defendant stated during the appeal withdrawal hearing that he was "fully satisfied" with his attorney's services. *Id.* The attorney who represented the defendant on appeal was the same attorney who represented him at trial. *Id*. It stands to reason that, when the defendant stated he was "fully satisfied," the defendant was referring to the entirety of the attorney's service, not just the attorney's service handling the appeal. The court found this to be a waiver of any further appeal. This is dissimilar to Petitioner's motion.

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In Petitioner's motion, Petitioner never vocalized his satisfaction with the attorney who handled his appeal. The attorney who represented Petitioner on appeal was a different attorney than the one who represented him at trial. Without Petitioner vocalizing his satisfaction with both attorneys, it lends credibility to the claim that Petitioner was not satisfied with either his appellate or trial attorneys. This follows the holding in *Reed*; even if "a defendant should have no known reason to file such a petition [appealing to the Supreme Court regarding a voluntary dismissal], this is not the same as saying that he is legally foreclosed from doing so." *Reed*, 2011 WL 2038627, at *4. This logic falls in line with the language of § 1254, that states any party, either victor or loser, may file a writ of certiorari for review. 28 U.S.C. § 1254(1). Because the court in *Westmoreland* places substantial weight on the defendant's statement of satisfaction, it makes the Petitioner's motion distinguishable. Lastly, *Westmoreland* is distinguishable from the Petitioner's motion because the defendant in *Westmoreland* is a state inmate, whereas Petitioner is a federal inmate.

Since Petitioner is a federal inmate, his motion is bound by the language of 28 U.S.C. § 2255. For Petitioner, the limitation period runs from "[t]he date on which a judgement of conviction becomes final," not "the date a judgement bec[omes] final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. §§ 2255; 2244. When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). It's reasonable to assume that this more restrictive language was put in place for state prisoners, since the Supreme Court has clearly dictated, for the purposes of federal inmates, when a judgment "becomes final" *Clay*, 537 U.S. at 527. "[F]inality attaches . . . when this court affirms a conviction on the merits

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on direct review or denies a petition for writ of certiorari, or when the time for filing a certiorari petition expires." *Id.*

The government argues Petitioner's motion is untimely "in light of the fact that [Petitioner] has never taken any action which even remotely suggests that he intended to pursue his appeal or a writ of certiorari regarding the Order of Dismissal." (DE 5, 13). This implicitly acknowledges Petitioner had the option to pursue an appeal but did not. This presumption is reinforced by 28 U.S.C. § 1253, which allows *any* party—winner or loser—to appeal the decision of a court of appeals to the Supreme Court by writ of certiorari. Regarding Petitioner's motion, based on the definition of finality articulated in *Clay*, the language of 28 U.S.C. §§ 2255 and 1253, Petitioner's judgment became final after the ninety (90) day period designated for petition of writ of certiorari elapsed. His motion is probably timely.

Applicant Details

First Name	**Cameron**
Last Name	**Bainbridge**
Citizenship Status	**U. S. Citizen**
Email Address	**ctb44@duke.edu**
Address	**Address** Street **331 Millspring Drive** City **Durham** State/Territory **North Carolina** Zip **27705** Country **United States**
Contact Phone Number	**6159343351**

Applicant Education

BA/BS From	**Wake Forest University**
Date of BA/BS	**May 2019**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Journal of Comparative and International Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Griffin, Lisa
Griffin@law.duke.edu
919-613-7112
Baker, Sarah
baker@law.duke.edu
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References

Professor Sarah Baker
2019-2020 Legal Analysis, Research, and Writing Professor
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Professor Thomas Metzloff
Fall Semester 2019 Civil Procedure Professor
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Professor Jayne Huckerby
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

331 Millspring Drive
Durham, NC 27705

June 8, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the
Eastern District of Virginia
Spottswood W. Robinson III &
Robert Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year student at Duke University School of Law, and am writing to express my interest in clerking for you during the 2022-23 term or any term thereafter. I will graduate from law school in May 2022, and will be available to clerk any time after that date.

My prior experiences, both in my coursework at Duke Law and in my experience last summer at the US Attorney's Office, will make me an effective clerk. As an undergraduate at Wake Forest, my experiences as a history major and in writing my honors thesis provided opportunities to develop my skills in time and project management, rigorous research, and sophisticated writing. At Duke Law, I have had the opportunity to continue to cultivate and apply these skills in my coursework and law journal experience. I have taken several litigation-focused classes such as evidence, administrative law, and privacy law. I have also developed my writing and editing skills on Duke Journal of Comparative and International Law, and I look forward to continuing to refine them in a leadership position as an executive editor for next year's issues.

This past summer, my work at the US Attorney's Office gave me real-world experience in synthesizing complicated legal research into a complete and polished work product within a fast-paced public service legal environment. I also look forward to further utilizing these skills in a similar litigation environment in my position with Legal Aid of North Carolina this summer.

I have enclosed a resume, a writing sample, an unofficial law school transcript, and a list of references for your review. My letters of recommendation, from Duke Law professors Griffin and Baker, are also attached. I would be happy to provide any additional information. Thank you very much for your consideration.

Sincerely,

Cameron Bainbridge

Cameron Bainbridge

331 Millspring Drive
Durham, NC 27705

cameron.bainbridge@duke.edu
615-934-3351

6581 Stableford Lane
Franklin, TN 37069

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected, May 2022
GPA: 3.45
Honors: Duke Journal of Comparative and International Law, *Executive Editor*

Wake Forest University, Winston-Salem, NC
Bachelor of Arts in History, *magna cum laude*, May 2019
GPA: 3.69
Thesis: The "freest country in the world" Through American Eyes: The United States and the First Russian Revolution
Honors: 2019 Chilton-Pearson Research Prize in United States History
Phi Alpha Theta (History Honor Society)
Activities: Model United Nations, *Vice President*
Jenny Marshall for US House Campaign, *Campus Intern*

EXPERIENCE

Legal Aid of North Carolina, Charlotte, North Carolina
Legal Aid Summer Intern, May 2021 - July 2021

- Represented clients in state court trials under North Carolina's third year practice rule.
- Developed litigation strategy with attorneys under tight deadlines.
- Drafted pleadings, motions, and other litigation documents for clients.
- Advised clients on litigation processes and achieving client goals, in trial, appeal, and settlement contexts.

United States Attorney's Office for the Middle District of Tennessee, Nashville, Tennessee
Volunteer Law Clerk, May 2020 - August 2020

- Conducted legal research and produced research memoranda in criminal and civil litigation fields, including criminal law, administrative law, and evidence issues.
- Researched legal issues and wrote drafts of motions and responses for both federal district court and the Sixth Circuit, including responses to motions to correct or set aside a sentence, to bifurcate a trial, and to suppress evidence.

Office of the Mayor of Indianapolis, Indianapolis, Indiana
Legislative Affairs Intern, May 2018 - August 2018

- Coordinated fact-finding for impending federal litigation for mayoral administration and approximately 10 government agencies.
- Researched impact of recent court decisions on voting practices and produced subsequent policy recommendation report for mayoral administration and County Election Board.
- Analyzed budget projections of approximately 20 government agencies and produced reports for mayoral administration and City Procurement Office.

ADDITIONAL INFORMATION

- Proficient in Mandarin Chinese (Simplified Characters).
- Lived in UK 2001-2004, in China (PRC) 2008-2011, in Swiss Confederation 2011-2015.
- European Champion of the 2014 and 2015 International History Bee, European Champion of the 2014 and 2015 International History Bowl.
- Worked as a camp counselor during summers 2016 and 2017, and as a Postmates delivery driver during summer 2019.

Cameron Bainbridge

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UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2019 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Procedure	Metzloff, T.	3.6	4.50
Contracts	Greene, S.	3.2	4.50
Torts	Frakes, M.	3.4	4.50
Legal Analysis, Research, Writing	Baker, S.	*Credit Only*	0.00

2020 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Constitutional Law	Powell, J.	*Credit Only*	4.50
Criminal Law	Coleman, J.	*Credit Only*	4.50
Property	Bradley, K.	*Credit Only*	4.50
Legal Analysis, Research, Writing	Baker, S.	3.7	4.00
Foundations of Law	Boyle, J.	*Pass*	1.00

2020 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Evidence	Griffin, L.	3.5	4.00
Administrative Law	Benjamin, S.	3.3	3.00
Ethics and the Law of Lawyering	Schwoerke, A.	3.0	2.00
Business Associations	de Fontenay, E.	3.4	4.00
Human Rights Advocacy Seminar	Huckerby, J.	3.6	2.00
JD Professional Development	N/A	*Credit Only*	0.00

2021 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
International Arbitration	Mellske, R.	3.6	2.00
International Law	Helfer, L.	3.2	3.00

Privacy Law and Policy	Dellinger, J.	3.6	3.00
Civil Rights Litigation	Miller, D.	3.6	3.00
Int'l Law of Armed Conflict	Dunlap, C.	3.6	3.00

2021 WINTERSESSION

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Deposition Practice	Katz, D.	*Pass*	0.5
Hearings Practice	Cox, C.	*Pass*	0.5

TOTAL CREDITS TOWARD DEGREE: 62
CUMULATIVE GPA: 3.45

**Spring 2020: Covid-19 required changes in enrollment patterns and grading.*

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 09, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Cameron Bainbridge

Dear Judge Hanes:

I am pleased to submit this letter supporting Cameron Bainbridge's application for a clerkship in your chambers. Cameron is a strong student and an especially clear and persuasive legal writer. I believe he will be a diligent and successful clerk, and I hope that he will have the opportunity to meet with you in this process.

Cameron was a student in my Evidence class at Duke, a course in which the students evaluate the text, legislative history, and common law roots of the federal rules, study their development in the courts, and then apply them through practice problems. Although it is a large lecture class and was conducted entirely on Zoom, it is structured to ensure regular substantive exchanges with individual students. The evaluation process includes assessments of written advocacy, objective tests that cover the complex mechanics of the rules, and opportunities for oral presentations of assigned problems. Cameron did well on each of these metrics and earned an impressive 3.5 in the class. I reviewed his end-of-semester essay exam in preparation for writing this letter and was struck by his fluid and elegant writing. Indeed, he earned the maximum number of points for the structure and style of his responses, and I was not surprised to see on his transcript that he performed with distinction in the Legal Writing program as well.

Cameron will apply these skills as the Executive Editor of the *Duke Journal of Comparative and International Law*. He has also had the opportunity to gain litigation experience as a law clerk in the United States Attorney's Office for the Middle District of Tennessee this past summer.

In addition to his analytical and communication skills, Cameron is engaging, has lived all over the world, and has a wide range of interests and ideas. I hope you will consider his application and will not hesitate to reach out if I can address any questions about his candidacy.

Sincerely,

Lisa Kern Griffin
Candace M. Carroll and Leonard B. Simon Professor of Law

Lisa Griffin - Griffin@law.duke.edu - 919-613-7112

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210 Science Drive
Durham, NC 27708

June 09, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Cameron Bainbridge

Dear Judge Hanes:

I write to offer my recommendation for Cameron Bainbridge to serve as one of your law clerks. Cameron was a student in my legal writing course last year, a class which at Duke spans the entirety of the first year. He received one of the top grades in the class, which is all the more impressive given the arrival of Covid during the period the students wrote their appellate briefs.

Cameron not only showed strong writing in my class, but he was also recently elected as an executive editor on his law journal. He is intellectually curious and hard-working, and I know this journal experience will only bring increased rigor to his already prodigious writing and citation checking skills.

Cameron is also a collegial young man with a very interesting and varied background. His experiences living all over the world as a child give him a uniquely insightful point of view. As a former law clerk, I understand how important working with others is in such a small environment. He would be a thoughtful presence in chambers.

Please let me know if I can provide any further information in support of Cameron's application.

Sincerely yours,

Sarah C.W. Baker
Clinical Professor of Law

Sarah Baker - baker@law.duke.edu - 919-613-7039

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Writing Sample

This is a research memorandum I wrote as a volunteer law clerk for the United States Attorney's Office in Nashville. I have been given express permission to use it as a writing sample. The memorandum addressed two questions. First, I was asked whether it would comport with due process for Tennessee to prosecute a defendant who had already pled guilty to charges arising from the same conduct in federal court. Second, I was asked whether the defendant's federal guilty plea would be admissible in Tennessee state court if the state prosecution were to proceed.

To maintain confidentiality, I have edited the facts section to remove any identifying information. I have also edited the document to delete the names of the assigning attorney and the defendant, and to remove any potentially identifying information from my citations to record documents.

MEMORANDUM

To: [Assigning Attorney]
From: Cameron Bainbridge
Date: [Date]
Re: [Case Name]

Question Presented

Under Tennessee and federal law, may the state of Tennessee prosecute a defendant after he had already pled guilty to a federal offense arising from the same conduct? If Tennessee may do so, is the defendant's guilty plea admissible evidence in the state prosecution?

Brief Answer

Tennessee almost certainly may prosecute Defendant, and it may possibly admit Defendant's guilty plea to attempted murder into evidence. First, the doctrine of dual sovereignty permits the state to prosecute conduct already adjudicated by the federal system. Second, a Tennessee grand jury could properly consider the plea as evidence to return an indictment. Third, while Tennessee state law does not directly answer whether a guilty plea in federal court is admissible evidence in a dual sovereignty case, the majority of federal circuit courts permit the admission of a state court guilty plea on the basis of the Federal Rules of Evidence. When the respective federal and Tennessee rules of evidence on a given issue are identical, as is the case here, federal interpretations influence Tennessee courts. Most other states would also allow admission. The state court would therefore probably use the federal interpretation, and follow the persuasive authority of the majority of other states, to permit admission of the plea.

Facts

[Tennessee and federal authorities jointly investigated Defendant for a shooting, which wounded but did not kill the victim. Federal authorities and Defendant eventually reached a cooperation agreement, under which Defendant pled guilty to attempted murder. The victim subsequently died of the wound Defendant inflicted. State authorities now seek to charge Defendant with murder, and wish to use Defendant's guilty plea against him as substantive evidence in state court.]

Discussion

I. Can Tennessee bring homicide charges against Defendant?

Tennessee very likely could bring homicide charges against Defendant, despite Defendant's guilty plea to attempted murder in federal court. The United States Constitution guarantees that no person shall, for the same offense, be put in jeopardy of life or limb. U.S. CONST. amend. V. A second prosecution violates the Fifth Amendment if the charged offense has elements identical to the charge on which a defendant has already been acquitted or convicted. *Currier v. Virginia*, 138 S.Ct. 2144, 2153 (2018) (quoting *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975)).

The identical elements analysis applies only, however, if the same sovereign carries out both prosecutions. The federal government and the states are separate sovereigns. *See Heath v. Alabama*, 474 U.S. 82, 91–92 (1985) (noting that each state is a separate sovereign from the federal government for double jeopardy purposes). Under this "dual sovereignty" doctrine, a sovereign may therefore prosecute a defendant under its law even if another sovereign has

already prosecuted him or her for the same conduct. *Gamble v. United States*, 139 S.Ct. 1960, 1964 (2019).

A subsequent prosecution violates the Fifth Amendment, despite the dual sovereignty doctrine, if it amounts to a "sham prosecution." *United States v. Mardis*, 600 F.3d 693, 697 (6th Cir. 2010) (quoting *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959)). A subsequent prosecution falls within the "sham" exception if cooperation between multiple sovereigns is so close that it amounts to the use of one sovereign's justice system as a tool by the other. *See United States v. Deitz*, 577 F.3d 672, 686 (6th Cir. 2009) (explaining that the "sham" exception bars manipulation by a sovereign to achieve the equivalent of a second prosecution by that same sovereign (citing *Bartkus*, 359 U.S. at 123–24)). The "sham" exception is an extremely demanding standard. *See, e.g.*, *United States v. Angleton*, 314 F.3d 767, 773–74 (5th Cir. 2002) (noting that *Bartkus* does not identify any particular circumstances that would fall within the exception, and that in practice it exists "only in the rarest of circumstances." (citing *Bartkus*, 359 U.S. at 165 (Brennan, J., dissenting))).

The Double Jeopardy Clause of the United States Constitution binds Tennessee state courts through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Federal interpretations of the clause also bind Tennessee indirectly, as a matter of state constitutional law. The Tennessee Constitution affords no greater double jeopardy protections than the United States Constitution, and Tennessee courts expressly recognize and apply the dual sovereignty doctrine. *See Lavon v. State*, 586 S.W.2d 112, 114 (Tenn. 1979) ("[t]he double jeopardy provision of the Tennessee Constitution, Article I, [§] 10, affords the defendant no greater protection [than the federal equivalent]); *State v. Carpenter*, W-2001-00580-CCA-R3-CD, 2002 WL 1482799 at *8 (Tenn. Crim. App. 2002) (noting that Tennessee courts routinely

apply dual sovereignty, and declining to abandon the doctrine). Because the Tennessee Constitution's double jeopardy clause is identical to the federal equivalent, a subsequent prosecution permissible under the federal double jeopardy clause would also be acceptable under the Tennessee Constitution.

Here, the dual sovereignty doctrine applies to permit state prosecution. Tennessee and the federal government are distinct sovereigns, so one may prosecute an offense even after the other has prosecuted the same defendant for the same crime, on charges arising from the same conduct. *See Gamble*, 139 S.Ct. at 1965 ("where there are two sovereigns, there are two laws, and two offenses" (citing *Grady v. Corbin*, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting) *overruled by United States v. Dixon*, 509 U.S. 688 (1993))). Because a different sovereign administers each prosecution, there would be no double jeopardy issue even were Tennessee to prosecute for the exact same offense, with the exact same elements.

The state prosecution also does not fall within the "sham prosecution" exception. While state and federal authorities investigated the crime jointly, state authorities initiated the homicide proceedings with no instigation or prompting by the federal government. The "sham" exception is an extremely demanding standard, and the degree of cooperation between state and federal authorities here does not approach the level needed to constitute use of the state system as a tool by federal authorities. The state's subsequent prosecution would therefore comport with the double jeopardy clause of the United States Constitution.

Finally, the second prosecution is permissible under the Tennessee Constitution. The state constitution's double jeopardy clause reaches no further than the federal equivalent. *See Lavon*, 586 S.W.2d at 114. Because the United States Constitution would permit the subsequent

prosecution here under the dual sovereignty doctrine, the Tennessee Constitution would also permit it.

Double jeopardy does not prevent Tennessee's prosecution of Defendant for murder. Tennessee and the federal government are distinct sovereigns for double jeopardy purposes, so one may charge a defendant even after the other has already prosecuted for the same conduct. The behavior of Tennessee and the federal government also does not rise to the level required to meet the "sham prosecution" exception. Finally, Tennessee constitutional law permits the prosecution. Double jeopardy poses no obstacle to the charges.

II. Is Defendant's guilty plea admissible evidence at his state trial?

Defendant's guilty plea probably, though not certainly, is admissible evidence at his homicide trial in state court. It is well settled that a valid guilty plea in state court is admissible evidence in federal court. Tennessee state courts have not directly addressed the issue of whether a federal guilty plea is admissible in state court. However, when the federal and Tennessee rules of evidence on a particular issue are identical, Tennessee courts look to federal interpretations of the rule as persuasive authority. The admissibility of a state court plea in federal court is permitted through a Federal Rule of Evidence with an identical Tennessee equivalent.

Here, Defendant knowingly and voluntarily made his plea. His subsequent liability does not make his plea constitutionally infirm. Additionally, Tennessee state courts would look to federal interpretations of the pertinent rule of evidence, and therefore probably permit the admission of Defendant's guilty plea.

a) Defendant's guilty plea was knowing and voluntary.

A valid guilty plea must be voluntarily and intelligently made. *Boykin v. Alabama*, 395 U.S. 238, 242 (1968). A plea is voluntarily made when it has not been induced by threat, misrepresentation, or improper representations, and when the defendant is fully aware of the direct consequences of the plea when he or she enters into it. *Brady v. United States*, 397 U.S. 742, 755 (1969). The court need not inform the defendant of all possible collateral consequences of the plea. *King v. Dutton*, 17 F.3d 151, 153 (6th Cir. 1994) (citing *Brown v. Perini*, 718 F.2d 784, 788–89 (6th Cir. 1983)).

For a guilty plea to be voluntary, a court must inform the defendant only of his or her right to plead not guilty, the rights waived by pleading guilty, and other specific, direct consequences of pleading guilty, such as the maximum penalty he or she faces. FED. R. CRIM. P. 11(b)(1). Whether consequences other than those specified in Rule 11 are direct or collateral depends on whether the consequence is within the control or responsibility of the court which accepts the plea. *See El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002) (stating that deportation is outside the control of the sentencing court, and therefore collateral (citing *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988))).

Subsequent liability or punishment is a collateral consequence, of which the defendant need not be informed. Forms of later liability range widely, but virtually none is within the control of the sentencing court. *See United States v. Youngs*, 687 F.3d 56, 60 (2d Cir. 2012) (possibility of involuntary civil commitment as a collateral consequence); *El-Nobani*, 287 F.3d at 421 (deportation as a collateral consequence); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977) (parole revocation as a collateral consequence); *United States v. Lambros*, 544 F.2d 962, 966–67 (8th Cir. 1976) (enhancement of a later sentence under a recidivist statute as a

collateral consequence); *Redwine v. Zuckert*, 317 F.2d 336, 336–37 (D.C. Cir. 1963) (dishonorable discharge from the military as a collateral consequence). Generally, subsequent liability is collateral because it is not within the responsibility of the sentencing court. *See El-Nobani*, 287 F.3d at 421.

Subsequent liability in federal proceedings is also a collateral consequence. If a defendant pleads guilty in state court, the court need not inform him or her of potential federal criminal liability. *United States v. Long*, 852 F.2d 975, 979 (7th Cir. 1988). The failure of a state prosecutor to inform the defendant of potential federal prosecution as a result of the plea therefore does *not* render the plea constitutionally infirm, and consequently inadmissible. *See United States v. Odom*, No. 93-2526, 1994 WL 669675, at *3 (6th Cir. Nov. 29, 1994) (stating that failure to inform defendant of possible federal prosecution did not render the plea unknowing); *United States v. Campusano*, 947 F.2d 1, 5 (1st Cir. 1991) ("we decline to hold that the state prosecutor made a misrepresentation by failing to disclose the possibility of a federal prosecution" (citing *United States v. Bouthot*, 878 F.2d 1506, 1512 (1st Cir. 1989) *abrogated on other grounds by Perry v. New Hampshire*, 565 U.S. 228 (2012))).

Here, Defendant's plea was knowing and voluntary. It was not induced by threat or misrepresentations. Defendant's subsequent liability in state criminal proceedings also does not render the plea unknowing, because it is a collateral consequence. It was outside the control of the sentencing court, so the court was not required to inform him.

b) Defendant's guilty plea could serve as evidence for a grand jury.

A Tennessee grand jury could almost certainly use Defendant's guilty plea as evidence to produce an indictment. Under Tennessee law, the sufficiency and legality of the evidence

considered by a grand jury is not subject to judicial review. *State v. Carruthers*, 35 S.W.3d 516, 532 (Tenn. 2000). Where an indictment is valid on its face, it is sufficient to require a trial of the charge, regardless of the legality of the evidence the grand jury considered. *Id.* at 533. A Tennessee grand jury may therefore consider evidence seized in violation of the Fourth Amendment, hearsay evidence, unsworn testimony, or other evidence inadmissible at trial. *Id.* at 533 n.11.

A state grand jury may also consider inadmissible evidence without violating due process of law, as guaranteed by the Fifth and Fourteenth Amendments. Under federal law, a grand jury may use evidence obtained in violation of a constitutional right, but may not violate the right itself. For example, a jury may use evidence obtained in violation of the Fifth Amendment right against self-incrimination to produce an indictment, but the grand jury itself may not compel a witness to testify against his or her Fifth Amendment right. *See United States v. Williams*, 504 U.S. 36, 49 (1992) (noting that a grand jury may not compel testimony in violation of the Fifth Amendment, but may consider evidence obtained through a Fifth Amendment violation (quoting *United States v. Calandra*, 414 U.S. 338, 346 (1974))); *Costello v. United States*, 350 U.S. 359, 363–64 (1956) (declining to adopt a rule forbidding grand juries from acting on inadmissible evidence).

Here, a Tennessee grand jury could consider Defendant's guilty plea. As discussed *infra*, the plea would probably be admissible. However, even if it were inadmissible, neither Tennessee nor federal constitutional law prevents the grand jury from using it to return an indictment. Under Tennessee law, a grand jury's use of evidence is not subject to judicial review in any way, while under federal constitutional law, the grand jury may consider evidence which would be

inadmissible at trial. The grand jury could therefore properly use the plea as evidence to return an indictment.

c) Defendant's guilty plea is probably admissible at trial.

Defendant's guilty plea is probably, though not certainly, admissible at trial. Under federal law, a guilty plea from a prior proceeding, even from a different jurisdiction, is admissible evidence. *E.g.*, *United States v. Riley*, 684 F.2d 542, 545 (8th Cir. 1982); *Howell v. United States*, 442 F.2d 265, 273 (7th Cir. 1971). Tennessee law does not directly answer whether state evidence rules permit the admission of a federal court guilty plea. However, the state equivalent of the Federal Rule of Evidence which permits admission of a prior guilty plea is materially identical to its federal counterpart. FED R. EVID. 801; TN. R. REV. 803. When a Tennessee rule is identical to a federal equivalent, Tennessee courts look to federal interpretations of the rule to guide their decisions. *Continental Cas. Co. v. Smith*, 720 S.W.2d 48, 49–50 (Tenn. 1986). Additionally, most other states would permit admission. The weight of persuasive authority is therefore overwhelmingly in favor of admission.

The Federal Rules of Evidence permit the admission of out of court statements against a party when that party made them in an individual capacity. FED. R. EVID. 801(2). It is well settled that a guilty plea in a state court falls within Rule 801, if the plea was valid. *See United States v. Williams*, 104 F.3d 213, 216 (8th Cir. 1997) (permitting admission of a state court guilty plea as an admission of a party opponent (quoting *United States v. Holmes*, 794 F.2d 345, 349 (8th Cir. 1986))); *Odom*, 1994 WL 669675 at *5 (same). A state court guilty plea is therefore admissible in federal court through Rule 801, so long as the plea was valid.

Guilty pleas in federal court are also admissible under state law in several states other than Tennessee. A minority of states bars the use of a prior conviction or a guilty plea for evidentiary purposes, *see Jones v. State*, 215 P.3d 1091, 1098–100 (Alaska Ct. App. 2009). However, most jurisdictions to have confronted the issue permit the use of a federal court guilty plea as evidence against the defendant. *Griffin v. State*, 790 So.2d 267, 290–92 (Ala. Crim. App. 1999) (permitting evidentiary use of defendant's federal court guilty plea) *rev'd on other grounds sub nom. Ex Parte Griffin*, 790 So.2d 351 (Ala. 2000); *People v. Rabes*, 258 P.3d 937, 942–43 (Colo. App. 2010); *Obiozor v. State*, 445 S.E.2d 553, 556 (Ga. Ct. App. 1994); *State v. Castonguay*, 263 A.2d 727, 730 (Me. 1970); *State v. Rasheed*, 340 S.W.3d 280, 283–84 (Mo. Ct. App. 2011); *Dennis v. State*, 925 S.W.2d 32, 41 (Tex. Ct. App. 1995). The practices of most other states would therefore serve as strongly persuasive authority in favor of admission.

Finally, another state court to have confronted a virtually identical set of facts could provide guidance to Tennessee courts. In 1999, the Illinois Supreme Court confronted a nearly identical case in *People v. Williams*, 721 N.E.2d 539 (Ill. 1999). In that case, a defendant pled guilty in state court to attempted murder on the basis of a shooting which did not initially kill the victim. When the victim succumbed to his wounds years later, Illinois charged the same defendant with murder. *Id.* at 541. The Illinois Supreme Court held that the use of the guilty plea to attempted murder was admissible *if* it had been voluntary, because the later liability was merely a collateral consequence of the kind discussed *supra*, Section II.a. *Id.* at 543. Because the court concluded that the plea had been voluntary, it reversed the appellate court to hold the plea admissible.

Tennessee law does not directly address whether a guilty plea in federal court is admissible in a state trial. However, the Tennessee equivalent to Federal Rule of Evidence 801 is

identical to its federal counterpart. Each rule provides, in relevant part, that an out of court statement offered against a party is not hearsay if it is the party's own statement in either an individual or representative capacity. FED. R. EVID. 801(d)(2)(A); TN R. REV. 803(1.2). When a Tennessee rule of evidence is materially identical to a federal equivalent, Tennessee courts look to federal interpretations of the rule to guide their own decisions. *See Walsh v. State*, 166 S.W.3d 641, 648 (Tenn. 2005) ("the federal court's interpretation provides helpful guidance to our analysis because the two rules are virtually identical" (citing *Caldararo by Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738, 741 n.3 (Tenn. Ct. App. 1990))); *Continental Cas. Co.*, 720 S.W.2d at 49.

Here, Defendant's guilty plea would probably be admissible under the Tennessee rules of evidence. The Federal Rules of Evidence exempt a defendant's valid guilty plea from another jurisdiction from the hearsay rules. As discussed *supra*, Defendant's guilty plea was valid. The Tennessee hearsay exemption rules are materially identical to the federal hearsay exemptions. Tennessee courts look to federal courts' interpretations of evidence rules which are identical to state equivalents. A Tennessee court would thus look to the federal interpretations of Rule 801. The overwhelming majority of federal case law points to the admissibility of a state court guilty plea under Rule 801. The majority of other states would also permit admission of a federal guilty plea under their respective state rules of evidence, and another state court to consider virtually identical facts ruled in favor of admission. The weight of this persuasive authority would likely sway a Tennessee court to permit the admission of a federal court guilty plea under Tennessee rule of evidence 803.

Defendant's federal guilty plea would probably be admissible in a state court trial. First, Defendant's guilty plea was knowing and voluntary. Second, a Tennessee grand jury could use

the plea as evidence to return an indictment. Third, because the plea was knowing and voluntary, it is admissible under the Federal Rules of Evidence. Tennessee courts look to federal courts' interpretations of the Federal Rules of Evidence to guide their interpretations of state rules, so a Tennessee court would probably permit the admission of a federal court guilty plea. Defendant's guilty plea is therefore probably admissible evidence.

Conclusion

Defendant's federal guilty plea is probably admissible evidence in state court. The dual sovereignty doctrine prevents state prosecution from violating either the United States Constitution or the Tennessee Constitution. The plea is also probably admissible at trial. First, a Tennessee grand jury could use the plea to return an indictment. Second, because the plea was knowing and voluntary, it would be admissible at a federal trial had it been made in state court. Because federal interpretations of the Federal Rules of Evidence influence Tennessee courts' interpretations of state rules, a Tennessee court would probably permit the admission of the federal guilty plea into evidence in state court.

Applicant Details

First Name	**Brianna**
Last Name	**Banks**
Citizenship Status	**U. S. Citizen**
Email Address	**bbanks@jd22.law.harvard.edu**
Address	**Address** Street **1 Chauncy St** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**6302484453**

Applicant Education

BA/BS From	**Emory University**
Date of BA/BS	**May 2017**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 26, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**harvard journal of international law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Rosenfeld, Diane
rosenfeld@law.harvard.edu
617-496-6228
Rubenstein, William
rubenstein@law.harvard.edu
617-496-7320

References

• Professor William B. Rubenstein, Harvard Law School, Rubenstein@law.harvard.edu, (617) 496-7320
• Professor Diane Rosenfeld, Harvard Law School, rosenfeld@law.harvard.edu, (617) 495-5257

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brianna N. Banks

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June 15, 2021

The Honorable Elizabeth W. Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse 701 East Broad Street, 5th Floor
Richmond VA 23219

Dear Judge Hanes,

I am writing to apply for a two-year clerkship in your chambers beginning in 2022. I am currently a rising 3L at Harvard Law School. Enclosed please find my resume, law school transcript, writing sample, and letters of recommendations from the following people, who are also available to contact as my references:

- Professor William B. Rubenstein, Harvard Law School, Rubenstein@law.harvard.edu, (617) 496-7320
- Professor Diane Rosenfeld, Harvard Law School, rosenfeld@law.harvard.edu, (617) 495-5257

As you will see from my resume, I would bring a wealth of experience in legal research, analysis, and writing. As a research assistant for Professor Diane Rosenfeld, I completed several research projects for her forthcoming book on gender-based violence. Additionally, this past year I explored my own research in my forthcoming publication, *The (De)Valuation of Black Women's Bodies*, analyzing the ways in which the criminal justice system devalues Black women. My summer internships at Legal Momentum and Gibson, Dunn, & Crutcher have both allowed me multiple opportunities to complete various legal research projects, with topics ranging from the administrative procedure act to one-way intervention doctrine. Serving as a legal assistant for two years at Sullivan & Cromwell gave me a strong work ethic and the ability to manage multiple deadlines in a timely and organized fashion. I spent two years working on the Volkswagen legal defense team which provided me the opportunity to participate in various stages of a civil suit. I also currently serve as a Civil Procedure teaching assistant which has allowed me to further develop a greater understanding of civil court proceedings. I would be honored to contribute my skills to the important work of your chambers.

I would welcome any opportunity to interview with you. If there is any further information that would be helpful to you, please let me know. Thank you for your time and consideration.

Sincerely,
Brianna N. Banks

[Enclosures]

Brianna N. Banks

1 Chauncy St., Apt #11 Cambridge, MA 02138
(630) 248-4453 • bbanks@jd22.law.harvard.edu

Education

Harvard Law School, Cambridge, MA
Candidate for Juris Doctor, May 2022
Activities: Professor William B. Rubenstein, Teaching Fellow (Civil Procedure)
Professor Diane Rosenfeld, Research Assistant
Harvard Black Law Students Association, Sponsorship and Career Development Chair
Advocates for Human Rights, Researcher
International Law Journal, Line Editor
Harvard International Human Rights Clinic, Student Clinician

Emory University, Atlanta, GA
B.A. in Sociology and History (concentration in Law, Economics, and Human Rights), Minor in German Studies, May 2017
Study Abroad: Completed coursework at **Humboldt Universität**, Berlin, Germany, Fall 2016

Publications

Note, *The (De)Valuation of Black Women's Bodies*, 44 HARV. J.L. & GENDER 201 (forthcoming Summer 2021)

Experience

Gibson, Dunn & Crutcher LLP, Los Angeles, CA — May 2021 – July 2021
Litigation Summer Associate
- Drafted memorandum on one-way intervention doctrine under California law
- Created interview questions to assess the procedural rules of domestic arbitration

Legal Momentum (Women's Legal Defense and Education Fund), New York, NY
Impact Litigation and Policy Advocacy Legal Intern — June 2020 – December 2020
- Drafted memorandum on agency authority under Administrative Procedure Act
- Performed first-level document review of responsive material during discovery
- Researched criminal statutes affecting victims of domestic violence, and impact of COVID-19 on human trafficking in the United States

Sullivan & Cromwell LLP — July 2017 – June 2019
Litigation Legal Assistant, New York, NY
- Supported over 80 litigation attorneys on the Volkswagen matters, including a national class action, opt-out suits, and penalties compliance implementation
- Managed and organized deposition materials in preparation for trial
- Drafted cover letters and legal memoranda regarding updates to federal narcotics case that served as communications with *pro bono* client

Capital Markets Legal Assistant, Frankfurt am Main, Germany
- Translated business and legal documents from German to English
- Prepared cross-reference and definition checks for BaFin and SEC filings
- Drafted initial "shell" of prospectus for Initial Public Offering of ecommerce company

Skadden, Arps, Slate, Meagher & Flom LLP, Boston, MA — May 2016 – August 2016
Legal Intern
- Drafted legal memorandum concerning unauthorized practice of law
- Summarized social media, news, and patent information for copyright infringement matter in preparation for summary judgment

Skills and Interests

- Advanced professional German and basic Spanish language proficiency
- Travelling (20 countries throughout 4 continents), running, peloton cycling, and cooking

Harvard Law School

Date of Issue: June 14, 2021
Not valid unless signed and sealed
Page 1 / 2

Record of: Brianna Nicole Banks
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2019 Term: August 27 - December 18

1000	Civil Procedure 1 Rubenstein, William	H	4
1001	Contracts 1 Okediji, Ruth	H	4
1006	First Year Legal Research and Writing 1A Bronsther, Jacob	P	2
1004	Property 1 Mann, Bruce	H	4
1005	Torts 1 Boyle, Jamie	P	4

Fall 2019 Total Credits: 18

Winter 2020 Term: January 06 - January 24

1056	Pathways to Leadership Workshop for the Public/Non-Profit Sector Crawford, Susan	CR	3

Winter 2020 Total Credits: 3

Spring 2020 Term: January 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

1024	Constitutional Law 1 Jackson, Vicki	CR	4
1002	Criminal Law 1 Medwed, Daniel	CR	4
1006	First Year Legal Research and Writing 1A Bronsther, Jacob	CR	2
2098	Gender Violence, Law and Social Justice Rosenfeld, Diane	CR	3
1003	Legislation and Regulation 1 Tushnet, Mark	CR	4

Spring 2020 Total Credits: 17
Total 2019-2020 Credits: 38

Fall 2020 Term: September 01 - December 31

2024	Class Actions: Litigating Advanced Topics Clary, Richard	H	2
2048	Corporations Ramseyer, J. Mark	P	4
2079	Evidence Schulman, Emily	P	4
8099	Independent Clinical - Legal Momentum Rosenfeld, Diane	CR	3
2212	Public International Law Helal, Mohamed	P	3

Fall 2020 Total Credits: 16

Spring 2021 Term: January 25 - May 14

2217	Contextual Constitutionalism: The View From Race Lessig, Lawrence	H	4
2973	Foundations of International Arbitration: Theory and Practice (S01) Sobota, Luke	P	2
2510	Human Rights Advocacy Ossom, Aminta	H	2
8021	International Human Rights Clinic Giannini, Tyler	H	3
2918	Mass Incarceration and Sentencing Law Gertner, Nancy	H	3

Spring 2021 Total Credits: 14
Total 2020-2021 Credits: 30

Fall 2021 Term: September 01 - December 03

8020	Harvard Immigration and Refugee Clinic Ardalan, Sabrineh	~	3
2115	Immigration and Refugee Advocacy Ardalan, Sabrineh	~	2
2169	Legal Profession Wacks, Jamie	~	3

Fall 2021 Total Credits: 8

Winter-Spring 2022 Term: January 04 - April 22

2195	Negotiation Workshop Mnookin, Robert	~	4

Winter-Spring 2022 Total Credits: 4

continued on next page

Assistant Dean and Registrar

Harvard Law School

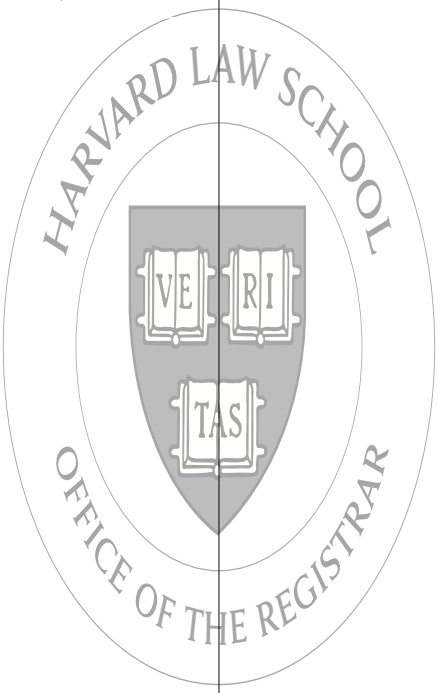
Record of: Brianna Nicole Banks

Date of Issue: June 14, 2021
Not valid unless signed and sealed

Spring 2022 Term: February 01 - April 22

2035	Constitutional Law: First Amendment Feldman, Noah	~	4
		Spring 2022 Total Credits:	4
		Total 2021-2022 Credits:	16
		Total JD Program Credits:	84

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
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www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

~~~~~~

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 21, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

One of the great pleasures of teaching at Harvard Law School is witnessing the intellectual growth of the students as they progress through their legal education. Brianna Banks is one such student with whom I have worked closely since spring of 2020, when she was a first-year student in my course on Gender Violence, Law and Social Justice. Based on my relationship with her, I can offer you my strongest possible recommendation for her as your judicial clerk.

Brianna stood out as exceptional within her class of peers, who were mostly upperclassmen. She always came to class well prepared—I knew I could count on her to have read and thoughtfully considered the course materials. Even when the pandemic forced us to change to a fully remote class format, Brianna did not miss a beat. She emerged as a class leader, liked and respected by her peers. She added great insights to every class discussion.

While faculty was not permitted to award grades that semester, I can say that her work was so excellent that I have hired her as a research assistant and as a teaching assistant for next year's class.

Watching Brianna develop her article on "The (de)Valuation of Black Women's Bodies" has been particularly gratifying. It started with a news article from the Washington Post that I assigned in class describing a horrific case in which Chrystul Kizer, a young woman who was the victim of child sex trafficking, killed her trafficker, claiming self-defense. While police had digital evidence that the trafficker had been commercially sexually exploiting other underaged girls--all African-American—no arrest had been made. Thus, the case raised race and gender discrimination questions in the context of law enforcement and failure to protect young girls from known serial predators. And what Brianna did about it has been exceptional.

While Brianna was a legal intern at Legal Momentum last summer, we collaborated on filing an amicus brief for an appeal in Chrystul's case. Brianna was the essential coordinator for this effort that resulted in a brief co-signed by the Harvard Law School Gender Violence Program, Legal Momentum and Bois, Schiller and Flexner, who worked on the case pro-bono. I am thrilled to report that we recently obtained a ruling in our favor. This would not have happened without Brianna's initiative.

But she did not stop there. After her summer internship ended, she continued her work at Legal Momentum through an independent clinical under my supervision. She wrote a paper entitled "The (de)Valuation of Black Women's Bodies" that is being published by the Harvard Journal of Law and Gender. Indeed, the paper is so outstanding and the case so important, that I asked her to present to my class this past semester and I included it in the course materials. It is an excellent piece of scholarship, all the more impressive that she did it over the course of an extremely challenging year.

This brings me to another point about Brianna—she is a very positive person who is a pleasure to work with. I know she will get along with all others in chambers with her usual enthusiasm and good cheer. I see how she interacts with the other research assistants on my book project. She learns, questions, challenges and discusses critical issues of gender and race equality with grace and intellectual muscle.

In summary, it has been wonderful to watch Brianna grow so intensely over the past year and a half. She is completely engaged in her study of the law; I know that at the end of it all, she will have exposure to a wide range of topics that will make her an ideal judicial clerk.

Thank you for your consideration of her candidacy for this position. Please feel free to contact me via email or on my cell phone (781.424.8939) should you wish to discuss her recommendation further.

Sincerely,

Diane L. Rosenfeld

Harvard Law School
6 Everett St., WCC 3026
Cambridge, MA 02138

Diane Rosenfeld - rosenfeld@law.harvard.edu - 617-496-6228

William B. Rubenstein
HARVARD LAW SCHOOL
1545 Massachusetts Avenue
Areeda Hall, Room 323
Cambridge, MA 02138

June 15, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Brianna Banks was a terrific student in my civil procedure class in the fall of 2020 and then did a great job serving as one of my Teaching Fellows the following year. I'm pleased to have the opportunity to recommend her for a judicial clerkship and do so enthusiastically.

Brianna was a teacher's dream during the civil procedure course. She was always prepared and attentive, completely on top of the materials when I called on her, and regularly volunteered good comments to class discussions. This describes about the top 10% of the 85 person class, but Brianna stood out even among that group. Why? First, when Brianna was struggling with material, she let me know – she would regularly state what she understood and where I had lost her and push me to make better sense of the material in conversation with her. This was incredibly helpful to me in leading class discussions, as I knew that if I had lost Brianna, I likely had lost most of the class – but few had the courage and self-confidence to say this in the 1L classroom the first semester of law school. Second, 1Ls occasionally try to show off their intellect with their questions but when Brianna struggled to make sense of material, it was always done earnestly, invariably led to terrific classroom discussions between us, and typically engaged and encouraged other students to join in. Third, Brianna did all that with remarkable good humor – she seemed really to be enjoying the course and engaging with the materials wholeheartedly. Her attitude was infectious and contributed to an upbeat environment for the entire section.

When the final exam grades were un-blinded, I was not surprised to see that Brianna's was an H level exam. The combination of her wonderful classroom and exam performances encouraged me to reach out to her to see if she would serve as a Teaching Fellow during the fall 2020 semester. That semester I taught two sections of civil procedure, to a total of about 150 students; because I was teaching over Zoom for the first time, I hired a half dozen upper level students to help ensure that the 1Ls were engaged and getting as good an intellectual experience as was possible. Brianna struck me as the perfect person for this job, given her classroom performance described above. And indeed Brianna did a great job as one of these TFs – she continued to combine a mastery of the materials with a truly winning attitude, helping the students capture much of the pedagogical excitement that characterizes 1L year (even in the procedure course).

Brianna's work with me is consistent with a very strong academic record. At Harvard Law School, she has earned 8 H level grades in 14 graded courses, thus maintaining something akin to an A- GPA. While at Emory College, she spent a summer as a legal intern at the New York office of Skadden Arps and then, after graduating in 2017, she spent two years working as a litigation legal assistant at Sullivan & Cromwell in New York. She then expanded into the public interest sector, spending her 1L summer at Legal Momentum (the Women's Legal Defense and Education Fund) and has rounded this out this summer by returning to the private sector at Gibson Dunn in Los Angeles. All of these experiences have prepared her well for a judicial clerkship, as she has more than the usual 2L's background in legal research, analysis, and writing.

My sense that Brianna's a terrific person is also well-supported: she has travelled through 20 countries and speaks several languages, is an avid runner and trivia enthusiast, and is part of a number of student groups at the law school, including serving as the Sponsorship and Career Development Chair of the Black Law Students Association, a researcher for Advocates for Human Rights, and a Line Editor of the Harvard International Law Journal.

Brianna has the intellect to be a successful law clerk and the personality to be a terrific presence in a small judicial chambers setting. I am pleased to have the opportunity to recommend her and do so enthusiastically and without reservation.

Sincerely,

William Rubenstein - rubenstein@law.harvard.edu - 617-496-7320

William Rubenstein
Professor of Law

William Rubenstein - rubenstein@law.harvard.edu - 617-496-7320

Brianna N. Banks
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(630) 248-4453 • bbanks@jd22.law.harvard.edu

WRITING SAMPLE

DRAFTED DECEMBER 2020

IN THE UNITED STATES DISTRICT COURT OF NEW JERSEY

CASE NO. XX-XX-XX

ADAM ALPHA, BETTY BETA, GARY GAMMA, DEBRA DELTA, and EDWARDS EPSILON, on behalf of themselves and others similarly situated, Plaintiffs

v.

THE ACME COMPANY, Defendant

JUDICIAL OPINION REGARDING PROPOSED CLASS SETTLEMENT

Before: BRIANNA N. BANKS, District Judge

I. Factual Background and Current Proceedings

The allegations in the present case arose from ACME Company ("ACME") producing the ACME Green beginning in January 2016. It is alleged that ACME intentionally deceived the market by marketing the ACME Green as a diesel car with the lowest emissions on the market. These low emissions ratings allegedly were the result of a "defeat device," a small computer chip placed on the engine which could detect when the car was on the road or undergoing an emissions test, and would lower its emissions accordingly.

This alleged defeat device was discovered on August 30, 2018, over two years after the ACME Green had first entered the market. Lawsuits commenced shortly thereafter. Plaintiffs complained that ACME violated various state consumer protection laws. Specifically, Plaintiffs alleged that the defeat device artificially inflated the price of the ACME Green, which caused all consumers to pay a price premium for the vehicle. Plaintiffs requested class certification for both a National Class and a Class that included only California Plaintiffs who sought to bring their claims under a California state statute which granted rescission as a remedy.

After oral arguments on the motion for class certification, the Plaintiffs and ACME, by and through their counsels of record, have entered into settlement agreements for this litigation, the terms of which are set forth in the Settlement Agreement. Counsel for the Settlement Class has requested the Court to approve the terms and conditions of the Settlement as set forth in the Settlement Agreement. About 100 class members have objected to the terms set forth in the Settlement Agreement. The Court has read and considered the Settlement Agreement, along with the filed objections, and has given the following inquiry into the fairness, reasonableness, and adequacy of the proposed settlement.

II. Jurisdiction

This Court has original jurisdiction over the matter under the Class Action Fairness Act (CAFA). 28 U.S.C. § 1332.

III. Discussion

Plaintiffs and Defendant seek approval of the Settlement Agreement and certification of the Settlement Class pursuant to Rule 23(b)(3). We begin by discussing the standards for certifying a settlement class. We will then consider the objections pertaining to the fairness of the settlement and the awards fees for the named Plaintiffs and for Plaintiffs' counsel.

A. The Settlement Class Is Not Certifiable Pursuant to Rule 23

Before approving a class settlement agreement, a district court must first determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied. *In re American Intern. Group, Inc. Securities*, 689 F.3d 229, 237 (2d Cir. 2012) (citing *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 341 (3d Cir. 2010). Rule 23(a) contains four threshold requirements, which every putative class must satisfy: 1) numerosity, 2) commonality, 3) typicality, and 4) adequacy of representation. Fed. R. Civ. P. 23(a); *See also Amchem Prods., Inc., et al. v. Windsor, et al.,* 521 U.S. 591, 613 (1997). Upon finding each of these prerequisites satisfied, a district court must then determine that the proposed class fits within one of the categories of class actions enumerated in Rule 23(b). In this case, Plaintiffs seek to certify a class under Rule 23(b)(3), which permits certification where the court finds that the questions of law or fact common to the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *See In re American Intern. Group*, 689 F.3d at 237 (2d Cir. 2012). If the class satisfies the requirements of Rules 23(a) and (b), then the district court must separately evaluate whether the settlement agreement is "fair, reasonable, and adequate" under Rule 23(e).

1. Concerns Under Rule 23(a)

Regardless of whether a settlement or a litigation class is being certified, the requirements of Rule 23(a) must be met. The Court is satisfied that that members of the Settlement Class are so numerous that joinder of all Class Members is impracticable. There do appear to be questions of law and

fact common to the Class Members and the claims are typical of the Settlement Class's claims. However, the Court does not believe that the Settlement Class has met all the 23(a) standards.

The greatest concern for the Court is the lack of adequate representation for *all* members of the class. The Settlement Class is defined as: "all persons, nationwide, who purchased or leased an ACME Green between January 1, 2016 and August 30, 2018." This class definition includes subsequent purchasers, but no class representative is a secondary purchaser. During class certification hearings, we questioned how we could know on what secondary purchasers relied in deciding to buy a used car if they do not have a named representative. Now, we have concerns on how the Court can know that the settlement adequately represents the interests of all the secondary purchasers who nevertheless will be bound to terms of the settlement.

Some subsequent purchasers have even objected to the class settlement, noting that they feel uncompensated and inadequately represented. The Court may assume that secondary purchasers did not sustain the same level of injury as primary purchasers, but neither the Court nor Counsel can quantify the injury of the secondary purchasers absent an adequate representative. For settlement classes, Rule 23(a) continues to serve the purpose of focusing court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. *Amchen*, 521 U.S. at 621 (1997). Without adequate representation, the Court cannot in good conscience bind the secondary purchasers to the agreement.

Others have objected to the secondary purchasers' inclusion in the Settlement Class because they believe the secondary purchasers are uninjured and a class, even a settlement class, cannot consist of uninjured plaintiffs. The Court does not find this argument to be convincing. The need to identify uninjured plaintiffs turns on the individual facts concerning that person, and the manageability of assessing those facts. *See In re Asacol Antitrust Litigation*, 907 F. 3d 42, 55 (1st Cir. 2018). However, a district court confronted with a request for settlement-only class certification need not inquire whether the case, if tried, would present intractable management problems. *In re American Intern. Group*, 689

F.3d at 239 (2d Cir. 2012). Regardless, many circuits view the issue of uninjured class members through the prism of Rule 23(b)(3) predominance (*See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.,-MDL No. 1869*, 725 F.3d 244, 252 (D.C. Cir. 2013), *Bell Atl. Corp. v. AT&T Corp.,* 339 F.3d 294, 302 (5th Cir. 2003). This Court sees no reason to divert from well-established precedent.

2. Predominance of Common Legal or Factual Issues Under Rule 23(b)(3)

The objectors challenge the Settlement Agreement because they do not believe that secondary purchasers have suffered an injury. Objectors also believe that the settlement should have two subclasses, divided by the states who employ the subjective standard and states with the objective standard. In the context of a settlement class, concerns about whether individual issues would create manageability problems at trial drop out of the predominance analysis because the proposal is that there be no trial. *Amchen*, 521 U.S. at 620 (1997). However, the Court must still determine whether legal or factual questions that qualify each class member's case as a genuine controversy are sufficiently similar as to yield a cohesive class. *See id.* at 623. The Court does not find any issues of predominance great enough to defeat the Settlement Class.

Our precedent provides that the focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 298 (3d Cir. 2011). In the present case, Plaintiffs alleged that ACME engaged in fraudulent behavior by installing a defeat device in their diesel cars. This alleged conduct resulted in a common injury to all class members – an inflated price premium for the vehicles – in violation of various state consumer protection statutes. In this respect, all class members have suffered an injury regardless of if they purchased their car new or used.

During the certification hearing, the Court was concerned that importing a fraud-on-the-market concept into state consumer laws would be inconsistent with *Erie*. However, our concerns were centered around the manageability of distinguishing variance in state laws. We do not hold the same concerns for settlement classes because settlement classes eliminate the principal burden of establishing liability. *See*

Sullivan, 667 F.3d at 298 (3d Cir. 2011). For the purposes of a settlement class, we believe that every ACME Green purchaser has an injury claim resulting from ACME's alleged fraudulent conduct and that the variations in state law do not defeat predominance. Finally, we also do not find the Settlement Class to be defeated by a "de minimis" number of uninjured plaintiffs. Defendants in class action suits are entitled to settle claims pending against them on a class-wide basis even if some claims may be meritless. *In re American Intern. Group*, 689 F.3d at 243 - 44 (2d Cir. 2012).

If this Court were to require a settlement class to exclude any plaintiffs without a strong claim or any states with variations in substantive law, we would effectively stifle the defendant's ability to achieve "global peace" by obtaining releases from all those who might wish to assert claims, meritorious or not. *See Sullivan*, 667 F.3d at 310 (3d Cir. 2011) (finding that mandating a class to include only those alleging 'colorable' claims would rule out the ability of a defendant to achieve 'global peace'). In an effort to avoid protracted litigation and future re-litigation, potentially across 50 states, ACME pursued a global settlement and demanded the release of any further claims against ACME relating to the ACME Green. We believe the objectors' claims would subject ACME to numerous individual suits and years of litigation. And, this Circuit has noted in the past that requiring every class member to individually possess "colorable legal claims" would make it increasingly difficult to approve nationwide class settlements entailing predominantly common issues. *Id.* at 312. This Circuit did not then, and we do not here, wish to frustrate the Defendant's right to achieve global peace.

B. Fairness, Adequacy, and Reasonableness of the Settlement Agreement

Before approving a class settlement agreement, a district court must determine that the settlement is fair to the class under Rule 23(e). Even though this Court has not found the requirements of Rule 23(a)(4) to be adequate, in the interest of efficiency, the Court will still provide guidance on any relevant issues the Settling Parties should consider under Rule 23(e). Rule 23(e) provides that a proposed settlement may only be approved after a hearing and on finding that it is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). Trial judges must be assured that the settlement represents adequate

compensation for the release of the class claims. *See Sullivan*, 667 F.3d at 319 (3d Cir. 2011). This Circuit has articulated nine well-established primary factors for a district court to consider in conducting its inquiry. *See id.* Because the Class will not be certified, we do not think it imperative to address all nine considerations. Instead, we will address the ones that are important to bring to the Settling Parties' attention before they re-negotiate the settlement.

1. The Reaction of the Class to the Settlement

This consideration attempts to gauge whether members of the class support the settlement by considering the number of objectors and opt-outs and the substance of any objections. *See id.* While there were only 100 objectors, some of the objectors had serious claims. For instance, some California purchasers feel that their rescission class claim was abandoned and that it would be cost prohibitive to opt-out and bring a separate claim under the California statute. Because of our fiduciary duty to the absent members to protect their interests and ensure that the settlement is fair, we would hesitate to approve any class settlement that did not enumerate protections for a whole subclass of people that fell under a particular state's statute.

2. The Settlement Structure Is Inconsistent with the Theory of Liability

The Court, and a few objectors, have concerns that the settlement structure is inconsistent with the theory of liability. If, as mentioned above, the theory of liability is that ACME engaged in fraudulent behavior by installing a defeat device in their diesel cars and that this alleged behavior resulted in a common injury to all class members then the damages payments should be similar amongst the plaintiffs. When we said that model prices decrease over time, we only meant to criticize the simplifying assumption that all new ACME Greens were valued at $30,000. In our view, the damages should not be awarded in proportion to the model year of the car, but instead to the purchase price the consumer paid. By way of example, consider two consumers who purchased their ACME Greens in 2016. One paid the full $80,000 and the other received the discount rate of $60,000. Assume as well that the ACME Green would have been worth $50,000 in 2016 without the defeat device. It stands with reason that the first

consumer sustained a greater injury than the second consumer (a $30,000 compared to a $10,000 price premium). But, the current Settlement Agreement would have them receive the same payment amount. We do not believe that the current methodology used fairly values the injuries of the class members.

3. The Stage of the Proceedings and the Amount of Discovery Completed

The Court must determine whether counsel had an adequate appreciation of the merits of the case before negotiating. *Sullivan*, 667 F.3d at 321 (3d Cir. 2011). This analysis stems from assessing the degree of case development that class counsel accomplished prior to settlement. This Court is not satisfied that Counsel conducted a sufficient merit discovery before beginning settlement conversations. At the end of the certification hearing, we noted that there was another year of discovery. We also criticized the Defendant for not securing their own expert. That was a month ago. In the meantime, there is no indication that there was further factual investigation, no experts have been retained, and no further legal theories have been developed. We do not quite understand how the Parties feel they are ready to settle when they have not adequately appreciated the merits of the case.

4. The Risks of Maintaining the Class Action Through Trial

Based on the variations of state law it is not likely that Plaintiffs would be able to maintain certification of a nationwide class if the action were to proceed to trial. Class certification is tenuous, as a district court may decertify a previously certified class if it becomes apparent that the requirements of Rule 23 are, in fact, not met. *Price v. L'Oreal USA, Inc*., at 2 (S.D.N.Y. 2018). As already discussed, while the variety of state law does not present an obstacle to certification of a settlement class, there is significant risk that a nationwide litigation class could not be sustained. Therefore, the considerable risk of maintaining the class action through trial weighs in favor of settlement.

5. Ability of Defendants to Withstand a Greater Judgment

Another consideration of the court in approving a settlement is whether the defendants could withstand a judgment from an amount significantly greater than the settlement. *Sullivan*, 667 F.3d at 323 (3d Cir. 2011). Class Action Lawyers have argued that this is the best recovery available, especially in light of this Court's prior comments. While we are skeptical of Dr. Langdell's analysis, the Court also

wonders if the Settlement is fair to the class considering that ACME is likely able to withstand a greater judgment. While courts do sometimes consider the deterring effect large judgments have on not only the Defendant company, but also on other similarly situated companies, we do not believe that ACME's ability to withstand a greater judgment necessarily undermines the fairness of the settlement. We only ask that the Parties consider the deterrence effect the Settlement will have, but we will not deny a Settlement solely on that basis.

C. Objections to the Fee Award

Objectors have also contested the Settlement for awarding excessive fees to both the named Plaintiffs and to Plaintiffs' counsel. They contend that the named Plaintiffs' bonus payments are improper because the named Plaintiffs did not adequately represent the class, and that they are too large compared to the cash damages awards. Additionally, objectors contest the legal fees as being "outrageous" compared to the cash damages awards for individual class members. We agree in part and disagree in part.

Incentive awards are awards typically given to named plaintiffs to compensate the class representatives for the work they have done in the class. These awards are not mandated by the Federal Rules, and have instead grown from common law in an attempt to incentivize plaintiffs to encourage settlement. Many circuits address the issue differently, but most courts allow service awards to be granted to the class representatives, so long as they are fair to the rest of the class and do not create conflicts between the representatives and the unnamed plaintiffs.

Some Class Members have objected to the incentive rewards because they believe the California representatives sold out the rescission class and some of the other representatives hurt the Class's case. These objectors conclude that the payments are, thus, too large compared to the cash damages awards for all other Plaintiffs. The Court is inclined to agree. During the certification hearing, we addressed our concerns regarding the strength of Gamma and Epsilon's testimony and the possibility of Alpha and Beta simultaneously representing the California Class and the Nationwide Class. It is our opinion that

the problems amongst the class representatives may have negatively impacted the strength of the Class's overall case.

Based on this potential negative impact, the Court does not believe it equitable that many of the representatives will recover more than any unnamed Class Member could. Based on our calculations, named Plaintiffs could even recover as much as $35,000 (Alpha) and some named Plaintiffs would recover the same as they would have under Langdell's theory (Beta's damages calculate to $30,000 under either calculation). The Class Action Lawyers argue that the bonus payments to the class representatives are standard. This Court however is not concerned with what is standard, but what is fair to the whole Class based on the settlement presented. While the Court does appreciate the value in compensating named Plaintiffs for the time and energy spent in representing the class, when the representation leaves more to be desired, we do not believe that named Plaintiffs should be able to collect more than the maximum recovery payment for the whole class. The Court does not agree that the "standard payment" should be used when the pay-outs are not equitable to the other Class Members. Accordingly, the Court recommends that the Settling Parties either increase the damages payments or decrease the incentive payments.

Objectors have also criticized the attorneys' fees. Attorneys' fees requests are generally assessed under one of two methods: the percentage-of-recovery ("POR") approach or the lodestar scheme. *Sullivan*, 667 F.3d at 330 (3d Cir. 2011). The POR applies a certain percentage of the settlement fund, and the latter multiples the number of hours class counsel worked on a case by a reasonable hourly billing rate for services rendered. In many cases, district courts will apply the POR method and then perform a Lodestar cross-check to confirm the reasonableness of the amount.

The Court will now assess the reasonableness of the attorneys' fees detailed in the Settlement Agreement. The Settlement states that Class counsel will be paid $3 million as a fee award, paid directly by ACME. Based on Class counsel's guesstimate of the settlement total, this award is about 12% of the total settlement (assuming the lower end of the guesstimate, $25 million). Additionally, the $3 million

fee award is 3x the counsel's Lodestar. While $3 million may be particularly high compared to an individual member's cash damages, we find it to be an appropriate amount in comparison to the total settlement amount. Even if the total settlement amount is closer to $15 million, which seems more likely if the individual payments are not amended as we recommended they be, the Court is still of the opinion that $3 million in legal fees is not outrageous compared to the settlement amount. The objectors are narrowly focusing on the individual amount instead of looking at the whole picture. Class counsel does not represent one individual class member, but represents the class as a whole. Therefore, they should be compensated based on the damages awarded to the whole class.

The Court is aware of other districts that have refused to approve fees that equaled to 3x the lodestar rate. *See, e.g., In re Hyundai and Kia Fuel Economy Litigation*, 926 F.3d 539 (9th Cir. 2019) (district court awarded McCuneWright an award that equaled a 1.5521 lodestar multiplier). Nevertheless, this Court believes that once Class counsel receives this opinion and addresses some of the above concerns, the attorneys' lodestar will likely increase, thus bringing $3 million slightly closer to the lodestar amount. If, based on the concerns mentioned above, Class Action Lawyers decide to increase the legal fees award, we will assess the new amount at that time. Though we would like to note that it may not be in their best interest to undertake that endeavor.

IV. Conclusion

For the foregoing reasons, we deny certification of the Settlement Class. We also recommend that the Settling Parties address the Court's substantive concerns about the settlement before they bring the matter back to the Court.

Dated this 18th day of December, 2020 So ordered.

Brianna N. Banks

Applicant Details

First Name	**Samuel**
Middle Initial	**H**
Last Name	**Barth**
Citizenship Status	**U. S. Citizen**
Email Address	**samuel.barth@colorado.edu**
Address	**Address** Street **1000 MAXWELL AVE, APT 5** City **Boulder** State/Territory **Colorado** Zip **80304** Country **United States**
Contact Phone Number	**2404299418**

Applicant Education

BA/BS From	**Wesleyan University**
Date of BA/BS	**May 2013**
JD/LLB From	**University of Colorado School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=80601&yr=2011**
Date of JD/LLB	**May 10, 2020**
Class Rank	**10%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s) **Colorado**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Professional Organization

Organizations **American Constitution Society**
Sonia Sotomayor Inn of Court
Native American Law Student Association
National Lawyers Guild

Recommenders

Newman, Mari
mnewman@kln-law.com
3035711000

Landis, Brett
Blandis@colegalserv.org
(303)449-5562

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SAMUEL HENRY BARTH
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August 26, 2020

The Honorable Elizabeth Hanes
701 East Broad Street, 5th Floor
Richmond, VA 23219

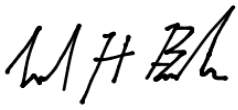
Dear Judge Hanes,

I am a recent law school graduate awaiting bar results and I am writing to apply for a 2021-2023 clerkship with your chambers. I am currently completing a one-year research and advocacy-focused fellowship here in Colorado, but I plan to move back to the "DMV" for work opportunities and to be closer to my family. I hope to continue to find compelling public interest work, and clerking for you would not only provide valuable experience but an opportunity to grow as a young lawyer.

I believe I would be a valuable addition to your chambers because of my past public interest-focused legal work. I have a broad range of public interest experience, including two years of clinic, a semester with a legal services organization, an internship with a mixed docket trial judge, and internships with firms litigating federal American Indian law issues, § 1983 claims, and employment discrimination claims. These experiences, as well as my academic accomplishments, demonstrate that I am versatile, hardworking, and a quick study. In addition, I have extensive research and writing experience. Along with normal intern assignments like writing research memos and drafting motions, I also completed an advanced legal writing class and have submitted petitions to the U.N. on behalf of indigenous clients. My work experience and work ethic demonstrate my faith in the law as a tool to make meaningful change for working and marginalized peoples. I believe these qualities also make me a good fit for your chambers.

My resume, transcripts, writing sample, and letters of recommendation are submitted with this application. Thank you for your consideration and your time, and if you have any further questions please reach out. I look forward to hearing from you.

Sincerely,



Sam Barth

SAMUEL HENRY BARTH

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BAR ADMISSION

- Awaiting results of Colorado/UBE Bar Exam, July 2020

EDUCATION

University of Colorado Law School, Boulder, CO
Juris Doctor — May 2020
Class Rank: 12/177 (top 10%); GPA: 3.78

- Order of the Coif
- Excellence in Clinical Education Award Recipient (Spring 2020)
- Public Service Pledge Award Recipient (Spring 2020)

Wesleyan University, Middletown, CT
Bachelor of Arts — May 2013
Graduated with Honors; GPA: 3.72

LEGAL EXPERIENCE

First Peoples Worldwide, Boulder, CO
Legal Fellow — August 2020 –

- Research and draft white papers on indigenous economic issues.
- Advocate for solutions to systemic economic inequalities and voting rights issues for indigenous peoples.

Killmer, Lane & Newman, LLP, Denver, CO
Student Law Clerk — Spring 2020

- Drafted discovery requests, demand letters, EEOC responses, and otherwise assisted civil rights attorneys with wage, Fair Housing Act, § 1983, Title II, and Title VII discrimination cases.

Boulder County Legal Services, Louisville, CO
Student Attorney — Fall 2019

- Met with low-income clients and represented them in court under the supervision of managing attorney.
- Drafted administrative appeals for clients in public benefits cases.

Fredericks Peebles & Patterson LLP, Sacramento, CA
Law Clerk — Summer 2019

- Researched state and federal administrative issues on behalf of Native American individuals and Tribes.

Colorado Office of the Attorney General, Denver, CO
Intern, State Services Section — Spring 2019

- Researched and drafted briefs for Health and Human Services cases and prepared cases for hearings.

American Indian Law Clinic, Boulder, CO
Student Attorney — Fall 2018 – Spring 2020

- Advised a group of Native Hawaiians opposing a major land development project on Hawai'i Island.

Judge Tamara Russell, 1st Judicial District, Golden, CO
Summer Clerk — Summer 2018

- Drafted county court appeals, researched issues before the court, and served as bailiff during trials.

ADDITIONAL EXPERIENCE

- National Lawyers Guild, Legal Observer (April 2019 – Present)
- Babe Ruth Bader Ginsburgs, Team Manager (Summer 2018)
- Acequia Assistance Project, Pro Bono Student Attorney (Spring 2018 – Spring 2020)
- CU American Constitution Society, Treasurer (Fall 2017 – Spring 2019)
- Four years as a freelance filmmaker and lighting designer in New York, NY (June 2013 – August 2017)

Samuel Barth
University of Colorado School of Law
Cumulative GPA: 3.78

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Bloom	A-	4	
Contracts	Schwartz	A-	4	
Legal Writing I	Stafford	A-	2	
Legislation & Regulation	Cantrell	A-	3	
Torts	Brunet Marks	A-	3	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Skinner-Thompson	A	4	
Criminal Law	Levin	A-	4	
Foundations of Legal Research	Harrell	P	1	Pass/Fail Elective
Legal Writing II	Stafford	A-	2	
Property	Collins	A-	4	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Indian Law	Collins	A	3	
American Indian Law Clinic	Fredericks	A	4	
Civil Rights	Skinner-Thompson	A	3	
Evidence	Bloom	A-	3	
Labor Law	White	A-	3	

Dean's List Fall 2018

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Research	Schultz	A	1	
Advanced Legal Writing	Bruce	A	2	
American Indian Law Clinic	Fredericks	A	4	
Employment Discrimination	Malveaux	A-	3	
Externship Program		P	3	150 Hour Externship
Trial Advocacy	Wayne	P	2	Pass/Fail Elective

Dean's List Spring 2019; class rank at end of year 9/181 (top 5%)

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced American Indian Law Clinic	Fredericks	P	2	Advanced Clinic Pass/Fail Only

Externship Program		P	2	100 Hour Externship
Health Law & Policy	Konnoth	B+	3	
Introduction to Intellectual Property	Surden	A-	3	
Legal Ethics & Professionalism	Fero	A	3	
Seminar: Class and Law	White	B+	2	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced American Indian Law Clinic	Fredericks	CR	1	
Economics of the American Legal System	Campos	CR	3	
First Amendment Law	Norton	CR	3	
Jurisprudence	Schlag	CR	3	
Motions Advocacy	Mix	CR	2	

Mandatory Credit/No Credit for all classes; final class rank 11/180 (top 10%)

Samuel Barth
Wesleyan University
Cumulative GPA: 3.72

Fall 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
History and the Humanities		B+	1	
Introduction to Planetary Geology		A-	1	
History of World Cinema		A-	1	
Advanced Placement English		CR	1	Pre-matriculation credit
19th Century U.S. History		A-	1	

Spring 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Plays for Performance		CR	1	Pass/Fail Seminar
Foundations of Contemporary Psychology		A-	1	
Introduction to Environmental Science		B+	1	
Introduction to Film Analysis		B+	1	

Fall 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Science in Western Culture		A-	1	
Introduction to Programming		B	1	
Introduction to Sociology		A	1	
Cognitive Psychology		A-	1	

Spring 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
The Past on Film		A-	1	
American Literature 1865-1945		A-	1	
Modern Drama		A	1	
Medieval Europe		A	1	

Dean's List Spring 2011

Fall 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Prague as a Living History		A	.5	
Rise and Fall of Communism in Central Europe		A-	.5	

Themes in Central European Cinema	A	1
Elementary Czech Language	A	1
Human Relationships in Czech Film	A	1

Study Abroad Semester - CERGE Program, Charles University (Prague, CZ)

Spring 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Cinema of Action and Adventure		B+	1	
Sight and Sound		A-	1	
Journalism		A-	1	
Roman Urban Life		A-	1	

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intro Strength Training		CR	.25	
Language of Hollywood		B+	1	
Advanced Filmmaking		A	1	
Weimar Cinema		A	1	
West African Dance		A	.5	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Filmmaking		A	1	
Cinema of Horror		A-	1	
National Cinema of Eastern Europe		A	1	
New German Cinema		A	1	

Dean's List Spring 2013; Awarded Honors in Film Studies for Thesis Film

KILLMER, LANE & NEWMAN, LLP ATTORNEYS AT LAW

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Darold W. Killmer
David A. Lane
Mari Newman
Michael Fairhurst
Thomas Kelley
Andrew McNulty
Liana Gerstle Orshan
Reid Allison
Helen Oh

September 3, 2020

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Magistrate Judge Hanes:

I am writing to provide my unreserved recommendation for Sam Barth. Throughout the winter and spring of 2020, Sam served as an intern for Killmer, Lane & Newman, LLP, a civil rights firm based in Denver, Colorado. Our firm specializes in representing individuals in plaintiff-side civil rights and employment law claims, as well as criminal defense actions.

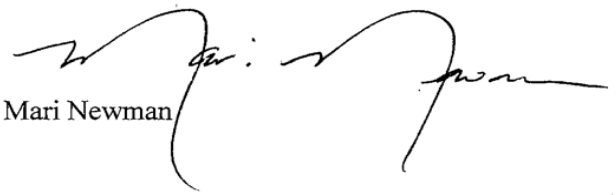
Although the pandemic has forced our law firm to work remotely since March, I had an opportunity to work directly with Sam on a number of projects and cases both before and after we moved to a fully remote workplace. I have been impressed by his thoroughness, writing skills, and intellectual curiosity. Sam repeatedly demonstrated an ability to quickly understand and distil large and complicated areas of the law; for example, he provided background information on short notice regarding a complicated First Amendment issue before we met with a potential client. He also turned several short research assignments into longer-form memos to be used as research resources for the whole firm.

I also observed that Sam truly cared about our clients and wanted to make sure the legal system was being used to right the wrongs that they had experienced. He drafted an excellent representation letter on behalf of one of our clients, advising a Homeowner's Association that their threats to fine the resident for displaying a mezuzah was religious discrimination under the Fair Housing Act. The draft letter was submitted with minimal revisions. In another case, I asked Sam to draft a rebuttal for the federal Equal Employment Opportunity Commission in response to the respondent employer's Position Statement, using available documents from the petitioner and legal analysis of Title II of the Civil Rights Act of 1964. In these cases and others, Sam showed that he was willing to put in the time and effort to be an advocate for those in need.

During his time at KLN, Sam demonstrated excellent writing skills and a commitment to providing thorough and substantive legal work product for our attorneys and clients. He worked well with the attorneys and staff of the firm, and was a pleasure to have around the office. I can only say that I was sorry not to have been able to work with him even more. I highly recommend him.

Please do not hesitate to reach out if I can provide any additional information in support of Sam's candidacy.

Sincerely,



Mari Newman

*Also admitted to practice in California
+Also admitted to practice in New York
^Also admitted to practice in Missouri
°Of Counsel

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Samuel Barth for a clerkship position. Mr. Barth was an extern with our office for the Fall of 2019. Throughout his time with us, I was impressed by Mr. Barth's quick grasp of the legal issues, his work ethic, and his enthusiasm for helping our clients.

At Boulder County Legal Services, a Colorado Legal Services office, we assist low-income and senior citizen residents of Boulder County in civil cases. While we serve clients in a wide variety of cases, the majority of our work assists clients in family law, landlord-tenant, public benefits, and consumer law cases. During this externship, Mr. Barth assisted clients with issues in all of these areas. He helped low-income and senior clients with complicated administrative law issues, as well as, worked with domestic violence survivors navigating custody disputes. He even had the opportunity to appear in court on behalf of an elderly client seeking a protection order to end abuse from a family member.

Mr. Barth took on a wide array of cases and committed many hours to helping his clients. While he was only scheduled to be in the office certain times, he continued to work remotely (from the law school) and responded to email questions clients had throughout the week. He far exceeded the number of hours required for his externship, and it was clear that he was motivated by a desire to do good and complete work on behalf of the clients. His attention to detail was remarkable, and any assignment I gave to Mr. Barth was sure to be done with a level of exactness and care.

Mr. Barth's care and concern for our clients was also demonstrated by his consistent enthusiasm. Even when tasked with difficult cases and less than optimistic facts, Mr. Barth applied a large amount of energy and care to the case. The clients recognized how hard he worked for them, and they felt like he was taking their cases seriously. All in all, Mr. Barth was a pleasure to have in our office and as a member of our team to help clients.

As the legal system responds to the current pandemic, people like Mr. Barth will have a lot to offer to assist in the challenges the court system faces. Substantively, several novel legal issues are likely to arise, and procedurally, the way our legal system works may see some changes. Mr. Barth is well-suited to respond to these challenges in a productive and helpful way. His work ethic, quick-thinking, and energy will be useful tools to any court system navigating this crisis. This is why he would be an excellent clerk for any judicial officer.

I am happy to speak with you further about this should you have any follow up questions. Please feel free to contact me at (303)449-5562 (office line), (303)746-1736 (home office line), or blandis@colegalserv.org. Thank you for your time and consideration.

Sincerely,

/s/Brett E. Landis

Brett E. Landis
Managing Attorney

Boulder County Legal Services
315 W. South Boulder Rd., Suite 205
Louisville, CO 80027
Phone: 303-449-7575
An Office of Colorado Legal Services

Note: This is the first draft of a rebuttal to the EEOC in response to Respondent's Position Statement. The rebuttal lays out the client's story, responds to specific elements of the Position Statement, and provides legal analysis supporting a case of discrimination. The names of all parties have been omitted. This work is entirely my own.

January 30, 2020

U.S. Equal Employment Opportunity Commission
Denver Field Office
303 E. 17th Avenue, Suite # 410
Denver, CO 80203

RE: *[Charging Party X] v. [Respondent]*
EEOC Charge No. XXX-XXXX-XXXXX

[Investigator]:

I am writing to provide a rebuttal to the Position Statement submitted by [Respondent] ("Respondent") in response to X's Amended Charge of Discrimination.

Ms. X was hired by Respondent in 2014, and served as an exemplary employee until a younger male supervisor was hired in June 2018. Despite Ms. X's 25 years of experience in the industry and excellent record with the company, the new supervisor targeted Ms. X and subjected her to discriminatory comments. When Ms. X raised concerns regarding his behavior towards her and other female employees, Respondent responded by retaliating against her. Over the course of six months, Ms. X was belittled, reprimanded, and demoted as part of Respondent's campaign against her. Unable to take it anymore, and facing termination, Ms. X was constructively discharged in February 2019.

Ms. X has compelling claims of discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, as well as the Colorado Anti-Discrimination Act ("CADA"). The EEOC should find CAUSE to believe that the Respondent's actions constituted unlawful discrimination and retaliation against Ms. X because of her age, sex, and her opposition to such discrimination, in violation of Title VII and the ADEA.

Factual Background

[Because of length limitations, this section has been omitted.]

Response to Respondent's Position Statement

In response to Ms. X's charges, Respondent proffers a number of counterfactual and pretextual reasons for her discipline, reassignment, and negative treatment. By relying on Ms. X's papered record and statements of the very supervisors who engaged in discrimination and retaliation, Respondent asserts that Ms. X was always a poor employee, and that she quit despite

her supervisor's best efforts to rehabilitate her work performance. These arguments are unsupported by the facts.

A. Respondent misconstrues and does not adequately respond to supported allegations of discrimination and retaliation.

Respondent generally fails in its Position Statement to respond to the number of specific instances of discrimination and retaliation raised by Ms. X. Ms. X has raised these issues a number of times, including but not limited to her Amended EEOC Complaint, her Mediation Statement, her Resignation Letter, her 1/18/2019 Helpline Complaint, her 8/31/2019 Helpline Complaint, and in a number of meetings with Respondent's supervisors. Ms. X's Resignation Letter, for example, contains three full pages of specific acts of discrimination and retaliation that she experienced between July 2018 and February 2019. These issues are not properly addressed in Respondent's Position Statement. Instead, Respondent simply states that Ms. X never suffered any adverse employment action, nor did she ever claim to have been retaliated against or discriminated against.

Despite Respondent's broad assertions, Ms. X plainly suffered discrimination and retaliation at the hands of [Supervisor] and other Respondent employees. The facts show that Ms. X was subjected to gender-based and age-based discrimination, including statements that she needed to conform to gender stereotypes and [Supervisor]'s numerous demeaning statements regarding Ms. X based on her age and gender. Ms. X also suffered relentless retaliation. Soon after her first meeting with [HR], she was twice forced to move her desk further from her team, was excluded from meetings, and was given impossible tasks. Many of her supervisory duties were given to less qualified male colleagues, and she was then later demoted. The totality of the treatment Ms. X received would have caused a reasonable person to leave their job, which Ms. X did in February 2019. The facts of the case show that Ms. X suffered numerous adverse employment actions.

Respondent also bizarrely asserts that Ms. X never raised issues of discrimination or retaliation in her complaints or statements, an assertion that is not only meaningless but baseless. In Ms. X's original conversation with [HR], as well as all subsequent meetings regarding [Supervisor]'s conduct, Ms. X raised issues related to sex and gender discrimination. Her 8/31/2018 Helpline Complaint, her 1/18/2019 Helpline Complaint, her Resignation Letter all reference discrimination and retaliation numerous times. **Ex. 7,** *8/31/18 Helpline Complaint*; **Ex. 14,** *1/18/2019 Helpline Complaint*; **Ex. 3,** 2/4/2019 *Resignation Letter*; **Ex. 11**, *[Other Female Supervisor] Letter*. Furthermore, "sex discrimination" is not a magic word that the employee must utter in order to invoke protection of our civil rights laws. The behaviors that Ms. X reported demonstrate that she was witnessing sex and age discrimination, and that she believed that [Supervisor] and Respondent were engaging in not only sex and age discrimination but retaliation. Respondent cannot simply ignore this mountain of evidence and argue that because it does not believe the magic words were said, there could not have been discrimination or retaliation. This contradicts the facts and undermines Ms. X's protected conduct in speaking out against discrimination in the workplace.

B. Respondent's claimed reasons for negatively treating, reassigning, reprimanding, and constructively discharging Ms. X are pretextual.

Respondent devotes most of its Position Statement to presenting alternate reasons for its illegal discrimination and retaliation. Respondent argues, variously, that Ms. X was disciplined because she was unable to complete work and failed to improve, that she had poor relationships with her direct reports, that she undermined [Supervisor], and that her demotion was not a reassignment. In doing so, Respondent provides reasons for its actions that are demonstrably pretextual.

Respondent argues that Ms. X was unable to complete assignments or achieve objectives set by [Supervisor]. However, prior to [Supervisor]'s hire, Ms. X not only completed all assignments but consistently exceeded her targets. **Ex. 1**, *End of Year Reviews 2014 – 2017*. Respondent's footnote that the prior manager was unable to properly evaluate Ms. X is completely unsupported and fails to explain the dramatic difference between her 2018 end of year review and all previous reviews. The only assignments that Ms. X struggled to complete were those for which she was not given any guidance, and when she was deliberately given impossible assignments. **Ex. 3,** 2/4/2019 *Resignation Letter*. Similarly, Ms. X repeatedly demonstrated that she was willing to do whatever she could to meet Respondent's ever-shifting demands, but unrealistic expectations made this impossible. *Id*. Given the facts of Ms. X's claims, it is plain that any change in Ms. X's performance was based on [Supervisor]'s animus, bias, and determination to retaliate.

Second, Respondent repeatedly claims that Ms. X had a poor relationship with the employees she supervised and was an ineffective manager. Respondent's major piece of evidence is the turnover that occurred around the time of Respondent's merger and prior to [Supervisor]'s hire. Respondent echoes [Supervisor]'s assertion that all four employees expressed concern regarding Ms. X's leadership in their exit interviews. This is a misstatement; the ex-employees mentioned leadership style as one factor in their exit interviews, and did not identify a specific supervisor. **Ex. 11**, *[Other Female Supervisor] Letter*.

Respondent's other major piece of evidence that Ms. X had a poor relationship with other employees is that employees noticed the tensions between Ms. X and [Supervisor], and that therefore she was to blame for any discomfort other employees felt about the situation. Respondent appears to have concluded from cursory interviews with employees that Ms. X should have ignored the discrimination she faced and witnessed, and any tension caused by Respondent's campaign of retaliation was Ms. X's fault alone. Respondent ignores that the relationship began to deteriorate after [Supervisor] began to discriminate against her and other employees, and instead believes that Ms. X was determined to undermine [Supervisor]. Although their communications show that Ms. X did all she could to keep a cordial working relationship, Ms. X is not responsible for mending a relationship broken by repeated discriminatory action. Respondent also gives significant weight to statements made to HR that were part of the concerted effort to force Ms. X out in December 2018 and January 2019. These statements are further evidence of retaliation, not of Ms. X's failures as a manager.

Furthermore, there is significant evidence that Ms. X was well liked and respected both before [Supervisor]'s hire and while she was being subjected to discrimination. Her end of year reviews for 2014 to 2017 show that her supervisors felt she managed tasks and her team well and was well respected. **Ex. 1**, *End of Year Reviews 2014 – 2017*. [Former Employee 1], for example, has stated that Ms. X was "a stellar employee" and "a true pleasure to work with." **Ex. 2,**

Declaration of [Former Employee 1]. [Former Employee 2] stated, "I know X was a great employee… she got along really well with everyone in the office." **Ex. 4,** *Declaration of [Former Employee 2]*. Ms. X kept her head up and tried to manage her direct reports in the face her supervisor belittling her and undermining her. For this, she received the admiration of her direct reports, not disrespect. *Id*; **Ex. 17,** *Feedback From Employees*. Respondent's repeated assertions that Ms. X was an ineffective manager contradicts the facts.

Finally, Respondent states at a number of points that the reassignment of Ms. X's duties to her male colleagues and direct reports and her demotion to a new position were not adverse employment actions. Respondent states that the only reason for these employment actions was because Respondent had identified problem areas in the department and the changes were in the company's best interest. We are asked to believe that the fact that the first of these changes occurred shortly after Ms. X first raised issues regarding [Supervisor]'s conduct, and then again after Ms. X made a formal complaint, is purely coincidental. This is a weak argument plainly unsupported by the facts. Respondent appears to concede that many of Ms. X's responsibilities were given to her younger, less experienced male colleagues prior to her move to a new department. Respondent also concedes that Ms. X was moved into a new department with fewer responsibilities and supervisory duties. Although her salary and benefits remained the same, Respondent concedes that Ms. X's title and responsibilities changed, and she no longer supervised the Contract Analysts. Ms. X's sole supervisory responsibility as "Supervisor, Records" appears to have been one contractor. Deciding not to dock Ms. X's pay is insufficient to show that her reassignments were not retaliatory or an adverse employment action. On the other hand, the proximity to her first report to [HR] and her loss of duties, as well as the end of the investigation and here reassignment, plainly show that this was an adverse action intended to retaliate against Ms. X.

Respondent proffers a number of arguments in its Position Statement to contend that Ms. X was properly disciplined and that there were legitimate business reasons for the discrimination and retaliation that she faced. These arguments are so weak, implausible, and plainly contradictory to the facts that they cannot be anything but pretext for Respondent's true motive – discriminating and retaliating against Ms. X.

Legal Analysis

Respondent has misconstrued the facts of Ms. X's employment and has provided pretextual reasons for taking negative employment action against her. Ms. X experienced illegal discrimination from her employer and has compelling claims under Title VII and the ADEA.

A. Respondent illegally discriminated against Ms. X on the basis of her age and sex.

Title VII makes it unlawful for an employer to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment on the basis of sex, race, color, religion, or national origin. 42 U.S.C. § 2000e-2(a)(1). The ADEA, likewise, makes it unlawful for an employer to discharge any individual or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment because of such individual's age. 29 U.S.C. §623(a)(1).

Under Title VII and the ADEA, a plaintiff may establish her case by either directly showing that her protected status was a determining factor in her discharge, or by relying on the three-part burden-shifting test established in *McDonnell Douglas Corp. v. Green*. 411 U.S. 792, 802-04 (1973); *Greene v. Safeway Stores, Inc.,* 98 F.3d 554, 557 (10th Cir. 1996). Under the *McDonnell* burden shifting test, a plaintiff must first establish a prima facie case of discrimination. *Id.* at 558. A plaintiff's burden in the first part of the test is not onerous. *Orr v. Albuquerque*, 417 F.3d 1144, 1149 (10th Cir. 2005) (describing the burden as "slight"). Once the plaintiff establishes a prima facie case, the employer must articulate a legitimate, non-discriminatory reason for its adverse employment action. If the employer can articulate such a reason, the burden then shifts back to the plaintiff to show that the proffered reason is in fact pretextual. *Lucas v. Dover Cpr., Norris Div.*, 857 F.2d 1397 at 1401 (10th Cir. 1988).

To establish a prima facie case of discrimination under Title VII, a plaintiff must show "(1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she qualified for the position at issue, and (4) she was treated less favorably than others not in the protected class." *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012). Similarly, under the ADEA, a plaintiff establishes a prima facie case by showing that (1) the employee was within the protected age group, (2) the employee was qualified for the position, (3) the employee suffered an adverse employment action, and (4) the employee was treated less favorably than others outside the protected class. *Jones v. Okla. City Pub. Sch*, 617 F.3d 1273, 1279 (10th Cir. 2010).

Notably, the Tenth Circuit has a fairly broad understanding of what constitutes an adverse action. *See, e.g.*, *Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1224 (10th Cir. 2006) (stating that a written warning may constitute an adverse employment action); *Wells v. Colo. DOT*, 325 F.3d 1205, 1215-1216 (10th Cir. 2003) (stating that reassignment to a position with different job responsibilities generally indicates an adverse action); *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1318 (10th Cir. 2017) (stating that an employer creating working conditions that would cause a reasonable person to resign is a constructive discharge and therefore an adverse action). Reassignment, constructive discharge, and papering an employee's file are therefore plainly adverse actions.

Ms. X sufficiently satisfies each of these prongs to establish a prima facie case of discrimination. Ms. X is a woman in her 50's and is therefore a member of a protected class under Title VII and the ADEA. With respect to the second prong, Ms. X was reprimanded, belittled, reassigned, and eventually constructively discharged, which are clear adverse employment actions. With respect to the third prong, Ms. X was plainly qualified for the position, having spent twenty-five years doing contract related work and fifteen years in a leadership role. She consistently met her targets and never received a negative review prior to [Supervisor]'s hire. Finally, Ms. X was treated less favorably than her younger and male colleagues, who were slowly given almost all of her assignments and responsibilities. She was repeatedly asked to be more "empathetic," and her competency as a supervisor was constantly doubted in a way that male colleagues never experienced. She was also treated worse than other younger, female colleagues, who experienced gender discrimination but did not have their competency challenged to the extent that [Supervisor] challenged Ms. X. Ms. X was subjected to hostility, mistreatment, and negative statements that those outside of the protected classes were not.

B. Respondent cannot meet its burden because the reasons for reprimanding, reassigning, and constructively discharging Ms. X are demonstrably pretextual.

Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to articulate some legitimate, nondiscriminatory, nonretaliatory reason for the employment decision. *Khalik*, 671 F.3d at 1192. Then, the plaintiff must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination or retaliation. *McDonnell Douglas Corp.*, 411 U.S. at 804. Plaintiffs can establish pretext in a number of ways. "A plaintiff can show pretext by revealing 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence.'" *Green v. New Mexico*, 420 F.3d 1189, 1192-93 (10th Cir. 2005) (*quoting Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)). Furthermore, "'glaring contradictions' between the plaintiff's evaluations and the employer's proffered reason for taking the adverse action" can constitute evidence that an employer's reasons are pretext. *Id.* at 1193. Pretext can also be established by "evidence of differential treatment of similarly situated employees or procedural irregularities." *Bennett v. Windstream Commc'ns, Inc.*, 792 F.3d 1261, 1268-69 (10th Cir. 2015).

Respondent offers a number of reasons why it took negative employment action against Ms. X; however, as established above, the arguments are weak, demonstrably false, and plainly pretext for discrimination and retaliation. Respondent's employees thought Ms. X was an excellent employee and supervisor, Ms. X completed all tasks that were capable of being completed, and she remained an excellent employee in the face of discrimination. The difference between how Ms. X and her younger and male colleagues were treated further demonstrates that Respondent's arguments were pretext. As Ms. X was being side-lined, her male colleagues, including recent hires who she had trained, were being given Ms. X's responsibilities. The actions taken against Ms. X are also plainly adverse employment actions, and Respondent cannot assert that any action was in the business interest of the company as cover for its discriminatory actions. It is plain that Respondent relied on a number of subjective criteria, including the opinion of [Supervisor], in taking these adverse employment action against Ms. X. This further suggests a general pattern of discrimination and retaliation.

Furthermore, the temporal proximity between Ms. X's protected conduct and Respondent's retaliation is highly probative of pretext. *Pathak v. FedEx Trade Networks T & B Inc.*, 329 F. Supp. 3d 1263, 1287 (D. Colo. 2018). As stated above, the discrimination Ms. X faced greatly increased in the weeks following her initial report to [HR]. In addition, Respondent's decision to reassign Ms. X five days after closing an investigation into Ms. X's concerns demonstrates a clear attempt to sideline her for raising issues of workplace discrimination.

The counterfactuals and arguments Respondent put forth in its Position Statement stating why Ms. X faced such severe punishment are demonstrably implausible and false. Furthermore, the difference between how Ms. X and her male colleagues were treated is evidence of pretext, as is the proximity between Ms. X's protected conduct and adverse action taken against her. Taken together, the facts demonstrate that there was a pattern of discrimination, and that

Respondent's reasons for repeatedly taking adverse action against her were pretext for discriminatory and retaliatory animus.

C. Respondent illegally retaliated against Ms. X.

The facts also support a claim for retaliation under Title VII and the ADEA, which prevent an employer from retaliating against an employee for opposing unlawful discrimination or harassment. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d). Notably, a plaintiff may maintain a cause of action for retaliation regardless of whether the discriminatory treatment to which she objected is adjudged to be in violation of the law. *Crumpacker v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1171 (10th Cir. 2003) (holding that Title VII retaliation claims are viable when plaintiff had a good-faith, reasonable belief that the underlying conduct violated Title VII); *see also Pastran v. K-Mart Corp*, 210 F.3d 1201, 1205 n.4 (10th Cir. 2000) ("Plaintiff may still proceed on his retaliation claim despite the fact that the district court dismissed his discrimination claims."). In order to succeed in a retaliation claim, therefore, the plaintiff need only demonstrate that she had a reasonable, good-faith belief that the mistreatment violated the law. *Love v. RE/Max of America, Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) ("[O]pposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated . . . [w]e agree that a good faith belief is sufficient.").

Here, Ms. X plainly suffered retaliation for speaking out against sex and age discrimination in the workplace. While [Supervisor] had always exhibited discriminatory behavior, his treatment of Ms. X got even worse when he learned that she had expressed her concerns regarding his behavior to [HR]. As demonstrated above, [Supervisor] isolated her from coworkers, undermined her authority, and made discriminatory comments, while elevating younger, male colleagues. Ms. X then received disciplinary warnings, reassignment that removed almost all of her supervisory duties, impossible assignments, and an extremely negative evaluation in an attempt to punish her for continuing to pursue a remedy for [Supervisor]'s actions. There is therefore clear evidence that Ms. X was retaliated against for opposing, and continuing to oppose, discrimination in the workplace.

Furthermore, the proximity of Respondent's negative actions to Ms. X's reporting is also indicative of retaliation. [Supervisor]'s discriminatory treatment worsened dramatically after he learned that she had reported concerns to [HR] on July 10. Her excellent record with Respondent also began to suffer a month after she first raised concerns regarding [Supervisor]. Her reassignment occurred five days after the conclusion of the internal investigation into [Supervisor]. Respondent's negative actions occurred shortly after Ms. X made complaints, supporting a clear inference that the actions were in retaliation for Ms. X speaking up. *See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) (holding that "[a] retaliatory motive may be inferred when an adverse action closely follows protected activity."). The actions taken against Ms. X, along with how quickly the actions occurred after Ms. X opposed discrimination at Respondent, demonstrate that Ms. X suffered retaliation.

Even assuming, arguendo, that Respondent can rebut all evidence of Ms. X's sex and gender discrimination claims, Ms. X clearly engaged in protected conduct by reporting [Supervisor]'s discriminatory behavior. She can therefore demonstrate that she was subject to retaliation under Title VII and the ADEA.

Conclusion

Ms. X was considered an exceptional employee and supervisor at Respondent until she spoke out against discrimination. The facts indisputably show that from the beginning of his employment, a younger male supervisor both implicitly and explicitly discriminated against female employees, and specifically older female employees. When Ms. X reported this behavior, Respondent began an active campaign of disciplining, disparaging, and sidelining her. The open hostility, coupled with the naked attempts to punish and demote her, led to Ms. X's constructive discharge in February 2019.

Accordingly, the EEOC should find CAUSE to believe that Respondent unlawfully discriminated against Ms. X on the basis of her age and sex, and unlawfully retaliated against her, in violation of the ADEA and Title VII.

If there is anything further we can do, or if you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Applicant Details

First Name	**Kate**
Last Name	**Bauer**
Citizenship Status	**U. S. Citizen**
Email Address	**kate.bauer@richmond.edu**
Address	**Address** **Street** **3126 W Cary St., #110** **City** **Richmond** **State/Territory** **Virginia** **Zip** **23221** **Country** **United States**
Contact Phone Number	**17032178392**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2005**
JD/LLB From	**University of Richmond School of Law** **http://www.nalplawschoolsonline.org/content/OrganizationalSnapshots/OrgSnapshot_235.pdf**
Date of JD/LLB	**May 11, 2019**
Class Rank	**20%**
Law Review/ Journal	**Yes**
Journal(s)	**Richmond Journal of Law & Technology**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Virginia**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

O'Rourke, John
orourkej@comcast.net
Baratz, Michael
mbaratz@steptoe.com
Zarin, Jason
jzarin@loc.gov
Samuel-Siegel, Doron
dsamuels@richmond.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

KATE BAUER

3126 W Cary St. #110 • Richmond, VA 23221 • (703) 217-8392 • kate.bauer@richmond.edu

May 4, 2022

The Hon. Elizabeth W. Hanes
United States District Court Eastern District of Virginia
Robert R. Merhige, Jr., Federal Courthouse
701 E Broad St.
Richmond, VA 23219

Re: Term Clerk Position

Judge Hanes:

As a professional with sixteen years' experience handling concurrent, fast-paced litigations at an AmLaw 100 law firm—first as an eDiscovery professional and, recently, as a lawyer—I would welcome the opportunity to put my skills to use as your term clerk.

Adaptability, efficiency, and reliability are my defining career traits. After graduating college, I began working as a paralegal at Steptoe & Johnson. I had intended to work there a few years before attending law school, but ultimately tabled my law school aspirations amid the 2008 recession. By then I had already developed substantial technical skills that earned me a reputation for "doing more with less." Recession-related hiring freezes put these skills to the test: I became one of the firm's only eDiscovery project managers. The legal and technological eDiscovery landscape evolved quickly during this time and I honed my project management skills supporting hundreds of elite case teams in time-sensitive, highly-technical litigations. I also grew accustomed to taking the initiative to solve novel technical problems and in 2015 became the first certified "Master" of the Relativity eDiscovery software.

This rigorous work experience produced in me the discipline to successfully attend law school at the University of Richmond while working concurrently at Steptoe. Along the way I had the privilege of serving as a judicial intern to the Hon. Henry Hudson (summer 2017) and a judicial extern to the Hon. M. Hannah Lauck (fall 2018), as well as working on the Richmond Journal of Law and Technology. In 2019 I obtained my J.D. magna cum laude, as well as my bar license.

I would welcome the chance to put my skills to use assisting with your considerable workload. I have attached my application materials for your review. I welcome the opportunity to speak with you further.

Best regards,

Kate Bauer

KATE BAUER

3126 W Cary St. #110 • Richmond, VA 23221 • (703) 217-8392 • kate.bauer@richmond.edu

PROFESSIONAL SUMMARY

Attentive, meticulous, and forward-thinking attorney who excelled in law school while concurrently serving as an award-winning AmLaw 100 litigation technologist and manager. Skilled at successfully balancing competing responsibilities in high-pressure, time-sensitive situations. Track record of successfully navigating novel challenges and mentoring others to do the same.

EXPERIENCE

Steptoe & Johnson, LLP, Washington, DC **2005 – 2021**

Manager of eDiscovery Services Department	2019 – 2021
Practice Solutions Architect	2017 – 2019
Litigation Support Applications Manager	2012 – 2017
Litigation Support Project Manager	2008 – 2012
Litigation Support Specialist	2007 – 2008
Litigation Paralegal	2005 – 2007

University of Richmond, Richmond, VA **Spring 2019**

Appellate Advocacy Teaching Asst. to the Hon. Marla Graff Decker, Chief Judge, Court of Appeals of Virginia

United States District Court for the Eastern District of Virginia, Richmond, VA **2017, 2018**

Judicial extern to the Hon. M. Hannah Lauck	Fall 2018
Judicial intern to the Hon. Henry E. Hudson	Summer 2017

EDUCATION

University of Richmond School of Law, Richmond, VA **May 2019**

J.D., magna cum laude (Class Rank: Top 20%)

University of Virginia, Charlottesville, VA **May 2005**

B.A., Economics, Foreign Affairs (Concentration in Latin America)

PROFESSIONAL ACCOMPLISHMENTS

Writing, Analysis & Research

- CALI award winner for highest grades in Legal Writing & Research (2017) and Immigration Law (2018).
- Drafted legal rule statements adopted as judicial standards by the Hon. M. Hannah Lauck's chambers (2018).
- Analyzed raw and structured data sets containing millions of data points (2007–21).
- Authored and validated original research as senior staff on Richmond Journal of Law & Technology (2017–19).

Training, Communication & Marketing

- Conceived and implemented legal ethics discussion "Law & Conscience in Tension" (2019). Successfully recruited diverse array of progressive, conservative, and special-interest cosponsors.
- Authored and presented dozens of trainings and CLEs to internal and external audiences (2007–21).
- Created and maintained department intranet site (SharePoint) and eDiscovery Wiki (OneNote) (2011–21).
- Created internal eDiscovery training and certification program for Steptoe paralegals (2017).
- Negotiated advantaged terms/pricing for Steptoe eDiscovery vendor Master Service Agreements (2018–21).

Administration & Innovation

- Increased eDiscovery department revenue 82% and profitability 85% between 2019 and 2021.
- Managed document collection, review, production, and trial support for dozens of concurrent cases (2007–21).
- Early adopter of Relativity document-review software (2009) and first-ever certified Relativity Master (2015).
- Implemented, supervised, and statistically validated TAR 1.0 and TAR 2.0 predictive coding projects (2011–21).
- International winner of Relativity Attorney Tech Evangelist Innovation Award (2020).

KATE BAUER

3126 W Cary St. #110 • Richmond, VA 23221 • (703) 217-8392 • kate.bauer@richmond.edu

ADMISSIONS & CERTIFICATIONS

Virginia State Bar, Member — 2019 – Present
- Active and in Good Standing (License No. 94657)

Relativity Master, Relativity — 2015 – Present
- Relativity Certified Administrator — 2012 – Present
- Relativity Project Management Specialist — 2021 – Present
- Relativity Infrastructure Specialist — 2015 – Present
- Relativity Analytics Specialist — 2014 – Present
- Relativity Review Specialist — 2014 – Present
- Relativity Assisted Review Specialist **(certification discontinued in 2020)** — 2014 – 2020

AWARDS & ACHIEVEMENTS

Relativity Attorney Tech Evangelist Innovation Award, International Winner — Sept. 2020

CALI Award, Immigration Law (Highest Grade) — Dec. 2018

Relativity Lit. Support All-Star Innovation Award, International Finalist — Oct. 2018

Steptoe & Johnson Paralegal Training and Certification Program, Creator — July 2017

CALI Award, Legal Writing & Research (Highest Grade) — May 2017

First-ever Relativity Master, Certification — May 2015

PROFESSIONAL AFFILIATIONS & ACTIVITIES

Richmond Bar Association — 2021 – Present

GW Law: James F. Humphreys Complex Litigation Center Projects — 2020 – Present
Contributing Team Member, *Assessing Proportionate Benefit and Cost ESI Model*

Metropolitan Richmond Women's Bar Association (MRWBA) — 2018 – Present

St. Thomas More Society — 2017 – Present
Student Chapter President (2017 – 2019)

Women in eDiscovery (WiE) — 2013 – Present

Relativity User Group, Richmond and DC Steering Committees — 2013 – 2020

Phi Delta Phi, Madison Inn — 2017 – 2019

Richmond Journal of Law & Technology — 2017 – 2019

Richmond Women's Law — 2016 – 2019

LANGUAGES

English: Native fluency

Spanish: Proficient reading, writing, and speaking abilities

French: Basic reading and writing abilities

KATE BAUER

3126 W Cary St. #110 • Richmond, VA 23221 • (703) 217-8392 • kate.bauer@richmond.edu

SELECT PAPERS & PRESENTATIONS

Getting Your "Docs" In a Row: Practical Considerations for Document Collection Review, and Production, CLE — Apr. 2020, Nov. 2021

Navigating Your Ethical eDiscovery Obligations following *DR Distributors*, CLE — Aug. 2021

GW/TCDI New Framework Proportionality Model Webinar, Panelist — May 2021

Relativity Analytics for Attorneys, CLE — Mar. 2021

Technology-Assisted Review – Changing the Game, Not the Rules, Paper — Feb. 2021

Relativity Searching for Attorneys, CLE — Dec. 2020, Jan. 2021

Superior eDiscovery Through Analytics, Presentation — Feb. 2020

Zoning, Privacy, and Nonconforming Law: The Case for Eliminating *Belle Terre*, Paper — May 2019

A Man for All Seasons: Law and Conscience in Tension, Moderated Discussion — Apr. 2019

Leveling the Field: Playing Technology-Assisted Review by the [Federal] Rules, Paper — Oct. 2018

Richmond Journal of Law & Technology Blog, Posts

- *John Henry, the Steam Drill, and the Increasing Demands of Rule 26(g)* — Mar. 2018
- *Technology-Assisted Review: Overcoming the Judicial Double-Standard* — Jan. 2018
- *America's Overlooked Surrogate Mothers* — Jan. 2018

Relativity Fest, e-Discovery Conference

- *Analytics: How to Get Buy-in from Stakeholders* — Oct. 2019
- *Turning Skeptics into Fanatics: How to Market Analytics to Your Case Team* — Oct. 2018
- *Marketing and Leveraging Analytics Internally* — Oct. 2017
- *Marketing and Leveraging Analytics Internally* — Oct. 2016

How to Champion Analytics at Your Law Firm, Webinar — June 2018

Document Review 2.0: Steptoe Case Study of Technology-Assisted Review, CLE — June 2016

UNIVERSITY OF RICHMOND

Student No: ***-**-2454 UR ID: 51029772 Date Issued: 16-FEB-2022
AEEE

Record of: Catherine E Bauer Page: 1
Issued To: Catherine Bauer
Parchment DocumentID: TWPH7IVN

Course Level: Law
Only Admit: Fall 2016

Current Curriculum
Juris Doctor
College : School of Law
Major : Law

Comments:
Class Rank: Top 20%

Degrees Awarded Juris Doctor 11-MAY-2019
Ehrs: 89.00 GPA-Hrs: 74.00 QPts: 269.90 GPA: 3.64

Degree Curriculum
College : School of Law
Major : Law
Inst. Honors: magna cum laude

INSTITUTION CREDIT:

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Fall 2016						
LAWR	513	CONTRACTS	4.00	B+	13.20	
LAWR	514	TORTS	4.00	A-	14.80	
LAWR	515	CIVIL PROCEDURE	4.00	B+	13.20	
LAWR	517	LAWYERING SKILLS I	3.00	A-	11.10	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 52.30 GPA: 3.48						
Spring 2017						
LAWR	503	CONSTITUTIONAL LAW	4.00	A-	14.80	
LAWR	506	CRIMINAL LAW	3.00	A-	11.10	
LAWR	516	PROPERTY	4.00	A	16.00	
LAWR	518	LAWYERING SKILLS II	2.00	A	8.00	
LAWR	519	LEGISLATION AND REGULATION	3.00	B+	9.90	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 59.80 GPA: 3.73						
Fall 2017						
LAWE	599	EVIDENCE	4.00	A	16.00	
LAWE	602	BUSINESS ASSOCIATIONS	4.00	B+	13.20	
LAWE	780	RESEARCH ASSISTANT-P/F	1.00	P	0.00	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
LAWR	598	LAWYERING SKILLS III	2.00	B+	6.60	
LAWR	605	PROFESSIONAL RESPONSIBILITY	2.00	A	8.00	
Ehrs: 13.00 GPA-Hrs: 12.00 QPts: 43.80 GPA: 3.65						
Spring 2018						
LAWE	600	FEDERAL INCOME TAXATION	4.00	P	0.00	
LAWE	606	WILLS AND TRUSTS	4.00	A-	14.80	
LAWE	631	CIVIL LITIGATION	3.00	A	12.00	
LAWE	699	DISCOVERY IN THE DIGITAL AGE	2.00	B+	6.60	
LAWE	796	INDEPENDENT STUDY	2.00	A	8.00	
LAWR	599	APPELLATE ADVOCACY	2.00	A-	7.40	
Ehrs: 17.00 GPA-Hrs: 13.00 QPts: 48.80 GPA: 3.75						
Fall 2018						
LAWE	611	REAL ESTATE TRANSFERS/FINANCE	3.00	A-	11.10	
LAWE	629	EMPLOYMENT LAW	3.00	A-	11.10	
LAWE	645	LAND USE PLANNING	3.00	A-	11.10	
LAWE	752	CLIN PLACE PROG: JUDICIAL	5.00	P	0.00	
LAWE	758	IMMIGRATION LAW	2.00	A	8.00	
Ehrs: 16.00 GPA-Hrs: 11.00 QPts: 41.30 GPA: 3.75						
Spring 2019						
LAWE	617	CONSTRUCTION LAW	2.00	A-	7.40	
LAWE	651	CONST LAW II: INDIVID RIGHTS	3.00	B+	9.90	
LAWE	676	FIRST AMENDMENT LAW	3.00	P	0.00	
LAWE	730	SPANISH LEGAL SKILLS	2.00	P	0.00	
LAWE	760	HOUSING LAW	2.00	B+	6.60	
Ehrs: 12.00 GPA-Hrs: 7.00 QPts: 23.90 GPA: 3.41						

********** CONTINUED ON PAGE 2 **********

Kristen A. Ball, University Registrar

UNIVERSITY OF RICHMOND

Student No: ***-**-2454 UR ID: 51029772 Date Issued: 16-FEB-2022

AEEE

Record of: Catherine E Bauer Page: 2

Level: Law

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	89.00	74.00	269.90	3.64
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	89.00	74.00	269.90	3.64

********** END OF TRANSCRIPT **********

Kristen A. Ball, University Registrar

OFFICE OF THE UNIVERSITY REGISTRAR
UNIVERSITY OF RICHMOND, VIRGINIA 23173
(804) 289-8639
email: registrar@richmond.edu / website: www.registrar.richmond.edu

COURSE CREDIT
As of Fall 2008, the undergraduate divisions of the School of Arts and Sciences, the Robins School of Business and the Jepson School of Leadership Studies converted from semester hours to units. A 1-unit course is equivalent to 3.5 semester hours. For all other schools (and the above schools prior to Fall 2008), course credit is awarded on the semester hour system. Credit is determined by a variety of factors, including contact time with a faculty member in a formal setting and expectations of independent study work through a nominal 15-week semester.

GRADING SYSTEM: since 1966

A+	4.0	
A	4.0	Excellent range
A-	3.7	
B+	3.3	
B	3.0	Good range
B-	2.7	
C+	2.3	
C	2.0	Average range
C-	1.7	
D+	1.3	
D	1.0	Poor range
D-	0.7	
F	0.0	Failure
I	0.0	Punitive Incomplete (make-up grade will appear to right of "I")
M	0.0	Withdrew Failing
V	0.0	Failure, excessive absence
H	---	Honors
P	—	Pass
S	—	Satisfactory, non-academic credit
U	—	Unsatisfactory, non-academic credit
W	—	Withdrew Passing
X	—	Grade unavailable
Y	—	Non-punitive Incomplete (make-up grade will appear to right of "Y")
Z	—	Audit
TR	—	Transfer

- Effective Fall 2008 and between Spring 1989 and Summer 1992, an approved undergraduate course taken for graduate credit is designated by a course number below the 500 level followed by a G.
- Prior to 1966 the 3.0 system was used, A=3 etc.
- Prior to Fall 1986, "0" designated failure for excessive absence, and except for Law, "+/-" did not affect the GPA. Prior to Fall 2002, "+/-" did not affect the GPA of Graduate Business students.
- Effective Summer 1992, graduate courses are transcripted separately from undergraduate courses.
- Prior to Summer 1992, courses numbered above the 400 level are graduate level unless otherwise indicated.
- Prior to Spring 1989, an approved undergraduate course taken for graduate credit is designated by a 400-level course number.

THE T.C. WILLIAMS SCHOOL OF LAW
- Effective Fall 2014, faculty policy provides for assignment of a mean grade of 3.3 in all classes.
- Prior to Fall 2014, faculty policy provides for assignment of median grades of B in all first-year classes.
- Prior to Fall 2001, faculty policy provides for assignment of median grades of B• in all first-year classes.
- Prior to Spring 1992, faculty policy provides for assignment of median and mode grades of C+ in all required classes.
- The law degree was the Bachelor of Laws (LLB) through 1969, Juris Doctor (JD) thereafter. LLB recipients have been given the option to exchange the LLB designation for the JD.
- Effective 2016: 87 hours required for graduation.
- 1993 – 2015: 86 hours required for graduation.
- 1973 - 1992: 90 hours required for graduation.
- 1942 - 1945: 80 hours required for graduation.
- 1975 - Pres: Grading scale outlined above except A+ and D• are not awarded.
- 1972 - 1975: D = 55 - 61, F = Below 55.
- 1938 - 1972: A = 80 - 100%, B = 70 - 79, C = 62 - 69, D = 60 - 61, E = 50 - 59, F = Below 50, with 84 hours required for graduation.

COLLEGE/SCHOOL NAMES
Prior to 1992, undergraduate liberal arts students were enrolled in and graduated from Richmond College or Westhampton College. Since Fall 1992, undergraduate students are enrolled in the School of Arts and Sciences, The E. Claiborne Robins School of Business, and the Jepson School of Leadership Studies. Richmond College and Westhampton College now serve as the undergraduate residential colleges.
Effective Fall 1994, the name of the University College changed to the School of Continuing Studies. Effective Fall 2012, the name of the School of Continuing Studies changed to the School of Professional and Continuing Studies.

ACCREDITATION
The University of Richmond is accredited by the Commission on Colleges of the Southern Association of Colleges and Schools to award associate, baccalaureate, masters, and juris doctor degrees. Contact SACSCOC at 1866 Southern Lane, Decatur, Georgia 30033-4097 or call (404) 679-4500 for questions about the accreditation of the University of Richmond. The University also is approved by the Virginia State Board of Education to offer teacher licensure programs. Various departments and divisions have more specialized accreditation. Included in this category are the chemistry program, accredited by the American Chemical Society; and the undergraduate teacher preparation programs and graduate certificate in teacher licensure program, accredited by the Teacher Education Accreditation Council. In addition, the Robins School of Business is accredited by the Association to Advance Collegiate Schools of Business International (AACSB) at the undergraduate and graduate levels, and the T.C. Williams School of Law is fully accredited by the recognized standardizing agencies in the United States, on the approved lists of the American Bar Association and a member of the Association of American Law Schools.

REPEATED COURSES
Repeated courses are noted to the right of the quality points earned for that course as follows:
I = earned hours included; calculated in GPA
A = earned hours excluded; calculated in GPA
E = earned hours excluded; not calculated in GPA
Consult the appropriate catalog for information on course repeat policies.

TRANSCRIPT VALIDATION
An official transcript is printed on secure paper with a blue background. When photocopied, the word COPY will appear. Further authentication may be obtained by calling the Office of the University Registrar.

GRADE POINT AVERAGE CALCULATION
The grade point average is calculated by dividing the total number of grade points earned by the total number of GPA hours. The grade point average is represented to two significant decimal points and truncated, not rounded. Transfer work does not calculate in the grade point average.

CONTINUING EDUCATION UNITS (CEUs)
The continuing education unit is used to recognize participation in non-credit classes, courses, and programs. The University of Richmond assigns CEU credit based on the SACS Commission on Colleges' document *C.E.U.: Guidelines and Criteria*. Such non-credit courses are designated as "CE" level and have an "M" or "N" attached to the course number. They are graded as satisfactory/unsatisfactory and cannot be used to satisfy any requirements in any degree program.

RELEASE OF INFORMATION
This transcript cannot be released to any third party without the written consent of the student in accordance with the Family Educational Rights and Privacy Act of 1974 (the Buckley Amendment). The message "Issued to Student" will be noted on the transcript when the transcript is provided directly to the student.

John V. O'Rourke
922 Beacon Square Court
Gaithersburg, MD 20878
April 26, 2022

To Whom It May Concern:

I am writing this reference at the request of Kate Bauer, with whom I worked at the law firm of Steptoe & Johnson, LLP for more than a dozen years.

In my capacity as the Director of Practice Support at Steptoe, I recruited Kate to join the Litigation/Practice Support department in 2008. Kate functioned in a number of progressively more responsible positions in our department over the ensuing years, as an eDiscovery Project Manager, Relativity Administrator, and Manager of eDiscovery Services. As the firm's Manager of eDiscovery Services, Kate managed a staff of eDiscovery Project Managers, and assumed primary responsibility for the design, development, and delivery of eDiscovery services to more than 500 lawyers across the firm.

While I knew that Kate was exceptionally bright when I hired her, I could not have foreseen how effectively she would rise to the many challenges I gave her over the years. Her intellectual curiosity, tireless pursuit of improvement, excellent communication and problem-solving skills, and strong client service orientation were tremendous assets to our firm.

One of Kate's strongest attributes is her ability to work productively with minimal direction. During her tenure as the firm's Relativity Administrator, I asked Kate to implement conceptual analytics at Steptoe. Using the capabilities offered by Relativity – the firm's enterprise eDiscovery platform - Kate piloted Relativity Analytics on test data with excellent results, including numerous applications of technology-assisted review (TAR), and began utilizing the technology on a host of live cases. Kate later developed a variety of marketing and instructional materials and delivered engaging presentations to our user community on the benefits of utilizing analytics in eDiscovery matters, single-handedly ensuring that Steptoe would soon rank among the most technologically advanced law firms in the realm of eDiscovery.

In closing, I can state without qualification that hiring Kate was the best hiring decision I made in a career spanning more than 35 years. Kate is a genuinely exceptional individual in every respect, and will be an outstanding addition to any organization that is fortunate enough to welcome her.

If you would like any additional information about Kate, feel free to contact me at 240-277-4100 or by email at orourkej@comcast.net.

Sincerely,

John V. O'Rourke

Michael J. Baratz
202 429 6468
mbaratz@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

Steptoe

May 5, 2022

Re: **Letter of Recommendation for Catherine E. Bauer**

Dear Sir or Madam:

It is my honor to recommend Kate Bauer as a law clerk. I have worked with Kate at Steptoe & Johnson for close to 15 years.

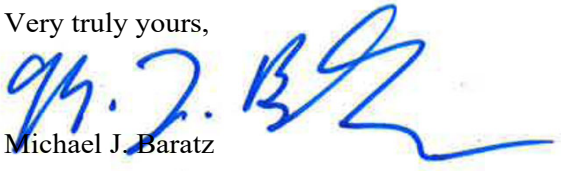
Kate has served both as a paralegal and with our litigation support team as a legal technology manager/adviser. She has approached those roles in the Firm with dedication, diligence and seriousness of purpose. Kate then decided—despite all of her close work with litigators—to go to law school and now has decided to pursue a legal career. The bar will be better served by Kate's decision to shift to a new direction.

I know that Kate has the necessary skills to be an excellent clerk.

I can also assure you that Kate, if given the opportunity, will help the Court resolve discovery disputes like no other. Kate's mastery of electronic discovery and technology assisted review is unparalleled and if such a dispute or occasion should arise, the Court would have an invaluable resource of knowledge that it would not surprise me if such an opinion led the way for the governing standards on these complex, ever-changing issues.

Feel free to contact me should you have any questions,

Very truly yours,



Michael J. Baratz

Jason Zarin
11317 Woodson Avenue
Kensington, Maryland 20895
(202) 630-2761
jason@zarin.org

Apr 26, 2022

Federal Courts Clerkship Programs

Re: Letter of Recommendation for Kate Bauer

Dear Sir or Madam:

I am pleased to write this letter of recommendation for Kate Bauer. From 2015 through 2018, I was the Head of Reference, Research, and Instructional Services for the University of Richmond Muse Law Library. As part of my responsibilities, I taught legal research as part of the required first-year curriculum.

Kate Bauer was one of my students in the legal research course for the 2016-2017 school year. A particular challenge of teaching a research course presented in the first year of law school is that new law students often deprioritize skills courses in favor of focusing more in their "substantive" classes (e.g., torts), much to their later disadvantage. In contrast, Kate clearly recognized the importance of legal research, perhaps due to her extensive paralegal experience before attending law school, and quickly rose to the top of the class. She was an active participant in both lectures and the small hands-on lab sessions, and presented both strong written and oral work.

Kate ultimately received the highest grade in the legal research and writing class. Working as a judicial clerk requires having strong legal research and writing skills. Accordingly, based on my experience having her as a student in my class, I wholeheartedly recommend her for a position as a federal judicial clerk.

Thank you very much for your time and consideration.

Sincerely,

Jason Zarin

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

SASHA J. JACOBSON	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 36-BR-0017**
	)	
EDUCATIONAL CREDIT MANAGEMENT CORPORATION	)	
	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Debtor Sasha Jacobson respectfully requests this Court grant her Motion for Summary Judgment to discharge her student loan debt. A debtor who shows that repayment imposes an "undue hardship" on her can obtain a discharge of student loans. 11 U.S.C. § 523(a)(8) (Westlaw 2017). Ohio courts use the three-pronged *Brunner* test to assess undue hardship. *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005). Defendant Educational Credit Management Corporation ("ECMC") has already stipulated that Jacobson meets Prong 1 and Prong 3. As this brief will detail, Ms. Jacobson meets Prong 2 ("Additional Circumstances") because she suffers from untreatable, incurable migraines that prevent her from finding or maintaining work. Thus, Ms. Jacobson's Motion for Summary Judgment should be granted.

STATEMENT OF FACTS

Every month for over two years Sasha Jacobson ("Jacobson") has endured untreatable, excruciating migraine pain lasting fifteen days or more. Trent Aff. ¶¶ 9-11. Her migraines do not respond to Triptan medications. *Id.* at ¶¶ 7, 10, 11. Triptans are a class of drugs that her doctor

regards as the most effective migraine treatments available. *Id.* at ¶ 4. Inability to treat or prevent her migraines—which cause head pain, sensitivity to light, dizziness, and nausea—Jacobson from obtaining full-time or part-time employment. *Id.* at ¶¶ 9-11.

Jacobson has been diagnosed with chronic migraines. *Id.* at ¶ 10. Chronic migraines increase the likelihood of central sensitization: that is, that repeated pain exposure will cause future headache episodes to be more easily triggered and more severe. Randall L. Oliver & April Taylor, *Treatment-resistant Migraines*, 4 Practical Pain Management, Jan. 1, 2004 at 5, http://www.practicalpainmanagement.com/pain/headache/migraine/treatment-resistantmigraines. There is no treatment once sensitization occurs. *Id.*

Before her debilitating migraines began, Jacobson financed her degrees by incurring student loans through ECMC. Jacobson Aff. ¶¶ 1, 2. From June 2008 until April 2014, she worked as a full-time substance abuse counselor in New York City, making as much as $80,000 per year. *Id.* at ¶ 3. Jacobson diligently paid her loans while employed. *Id.* at ¶ 1.

Stress is a migraine trigger, Oliver & Taylor, *Treatment-resistant Migraines*, at 3, and Jacobson faced severe stress in the months preceding her chronic migraine diagnosis, Jacobson Aff. ¶¶ 3, 4, 9, 10. In April 2014 she lost her job when her clinic unexpectedly closed, and, after a six-month job-hunt in NYC, she moved home to Akron, Ohio to care for her ailing parents and minimize expenses. *Id.* at ¶¶ 3, 4. The only job Jacobson could obtain in Akron was as a part-time counselor making just $20,000 per year. *Id.* at ¶ 5. To make ends meet, she waitressed four to five shifts per month at a Chili's restaurant while also caring for her parents. *Id.* at ¶¶ 4, 5. In December a stroke disabled Jacobson's father, and she became the primary caregiver for both of her parents. *Id.* at ¶ 9. She was under acute stress, and by February 2015 she was suffering four to five severe migraines per month, each lasting up to five days. Trent Aff. ¶ 9.

Jacobson's frequent migraines thwart her employment prospects. In March 2015 Chili's fired her due to migraine-related absences. Jacobson Aff. ¶ 14. In April Jacobson's father died and she became depressed. *Id.* at ¶ 12. Her migraines continued to afflict her for half the month, Trent Aff. ¶ 10, and in May the clinic fired Jacobson due to absences, Jacobson Aff. ¶ 14. She was diagnosed with chronic migraines in May. Trent Aff. ¶ 10. In May Jacobson also began treatment for her depression; a month later she had improved significantly. Maddox Aff. ¶¶ 2, 4, 5. Despite her ongoing migraines, Jacobson resumed her job search in September 2015. Jacobson Aff. ¶ 15. After six fruitless months applying for counseling jobs, she began applying for jobs as a waitress. *Id.* at ¶ 16. She has been offered seven interviews, but has missed five due to migraines. *Id.* at ¶¶ 15, 16. Jacobson's migraines continue unabated to this day. Trent Aff. ¶ 11.

No medication can treat or control Jacobson's chronic migraines, which prevents her from obtaining employment. *Id.* at ¶¶ 9-11. Due to central sensitization to pain, the migraines are unlikely to improve. Oliver & Taylor, *Treatment-resistant Migraines*, at 5. Because Jacobson is unlikely to find a job that can accommodate her condition, she is unable to pay back her student loans. Thus, she now seeks discharge of her debt.

PROCEDURAL HISTORY

On March 1, 2017, Jacobson filed her Complaint to Determine Dischargeability of an Educational Loan. On March 2, 2017, ECMC filed its Answer, conceding that Jacobson meets both Prong 1 and Prong 3 of the *Brunner* test. Resp't's Answer to Pet'r's Compl. ¶¶ 11, 17.

SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. This rule is applied to bankruptcy proceedings by Rule 7056 of the Bankruptcy Rules.

The movant may successfully demonstrate the lack of any genuine issues of material fact by proffering evidence indicating that absence of genuine issues of material fact, or by exposing before the Court an absence of evidence supporting the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-323 (1986).

ARGUMENT

Jacobson's Motion for Summary Judgment to discharge her student loan debt should be granted because Jacobson meets all three prongs of the *Brunner* test to assess "undue hardship" under 11 U.S.C. § 523(a)(8). The *Brunner* test requires a three-part showing:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself . . . if forced to repay the loans ["Prong 1"]; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans ["Prong 2"]; and (3) that the debtor has made good faith efforts to repay the loans ["Prong 3"].

Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir.1987).

Ohio courts adopted the *Brunner* test in *Oyler*, 397 F.3d at 385. ECMC has stipulated to Prongs 1 and 3, Resp't's Answer to Pet'r's Compl. ¶¶ 11, 17, so only Prong 2 is at issue.

I. JACOBSON'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE HER CHRONIC MIGRAINES MEET *BRUNNER*'S PRONG 2.

A debtor satisfies Prong 2 of the *Brunner* test by showing additional circumstances indicating that her state of affairs is likely to persist for a significant portion of the repayment period. *Oyler*, 397 F.3d at 386. The circumstances must be beyond the debtor's control, not borne of free choice, and must indicate a certainty of hopelessness rather than a present inability to fulfill financial commitments. *Id.* Such circumstances may include illness, disability, or a lack of usable job skills. *Id.* In instances of illness or disability, a debtor must show "a strong nexus between the medical condition and its adverse effect on the debtor's terms of employment

(specifically, a debtor's income)." *Morrow v. United States Dep't of Educ. (In re Morrow)*, 366 B.R. 774, 778 (Bankr. N.D. Ohio 2007) (citing *Swinney v. Acad. Fin. Servs. (In re Swinney)*, 266 B.R. 800, 805 (Bankr. N.D. Ohio 2001)). Although a debtor usually must show attempts to maximize her earnings under Prong 2, *Oyler*, 397 F.3d at 386, when illness precludes the debtor from working, Ohio courts instead consider income-maximization under Prong 3, *see, e.g., Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 365 (6th Cir. 2007); *Hertzel v. Educ. Credit Mgmt. Corp. (In re Hertzel)*, 329 B.R. 221, 234 (6th Cir. BAP 2005).

A. Jacobson has medical testimony corroborating that her severe and frequent migraines prevent her from finding or maintaining work.

Ohio courts hold that medical conditions meet Prong 2 when they substantially interfere with the debtor's ability to work. *Barrett*, 487 F.3d at 363. Courts prefer, but do not require, corroborating medical evidence of illness. *Id.* at 361. For example, in *Barrett*, the court held that a debtor satisfied Prong 2 after he testified cogently that he was unable to work due to a history of cancer, bone death, and severe pain. *Id.* Barrett, whose pain limited him to using a computer mouse, testified that potential employers routinely lost interest upon learning that his conditions prevented him from working full-time. *Id.* at 357. Similarly, the court held that a diabetic met Prong 2 where her morbid obesity, non-healing leg wounds, and related physical difficulties (1) caused her to lose her job and (2) kept her from performing basic daily activities. *Cekic-Torres v. Access Grove, Inc. (In re Cekic-Torres)*, 431 B.R. 785, 792-94 (Bankr. N.D. Ohio 2010).

In contrast, courts hold that debtors who can work in spite of their conditions do not meet Prong 2. For example, the court held that a debtor-social worker did not satisfy Prong 2 when she asserted she suffered from bowel irregularity, loss of taste, and PTSD, but failed to provide medical evidence or otherwise show that these conditions precluded her from working. *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 681 (6th Cir. 2005). In another

instance, the court held that a debtor-smoker was able to work despite her assertion that her emphysema, coupled with back and neck pain, prevented her from working. *Trudel v. United States Dep't. of Educ. (In re Trudel),* 514 B.R. 219, 224, 227 (6th Cir. BAP 2014). The court relied on the opinion of her treating physician, who stated that she could work four days per week, and that she would miss less than a week of work twice a year due to flare-ups. *Id.* at 224; *see also Grant v. United States Dep't of Educ. (In re Grant),* 398 B.R. 205, 212 (Bankr. N.D. Ohio 2008) (holding that debtor-nurse's back condition did not impede her earning ability because she was able to work so long as she was not required to lift heavy objects).

Unlike the debtors refused discharges in *Tirch*, *Trudel*, and *Grant*, Jacobson's doctor has corroborated that her migraines are too frequent and too severe for her to maintain full-time or part-time employment. Trent Aff. ¶ 11. These migraines do not respond to any available treatment, leaving Jacobson no option but to sequester herself every time her migraines attack. *Id.* at ¶¶ 9, 10. Similar to *Cekic-Torres*, Jacobson has lost jobs due to absences brought on by her migraines. Jacobson Aff. ¶¶ 9, 14. Additionally, as in *Barrett* and *Cekic-Torres*, she has also experienced difficulties obtaining new employment due to the limitations her condition places on her daily activities. *Id.* at ¶¶ 15, 16. Accordingly, the Court should find that Jacobson's migraines meet Prong 2 because they prevent her from finding or maintaining work.

1. Jacobson's inability to work due to chronic migraines excuses her from making a Prong 2 showing that she has attempted to maximize her income.

Although Ohio courts generally hold that Prong 2 requires a showing that a debtor has attempted to maximize his income by seeking jobs commensurate with his education and experience, *Oyler*, 397 F.3d at 386, an exception applies. When a debtor can show that a medical condition prevents her from working, Ohio courts instead regard attempts to maximize income as evidence of "good faith" under Prong 3. *See, e.g., Barrett*, 487 F.3d at 365; *Hertzel*, 329 B.R. at

234. Because Jacobson's migraines prevent her from working, Trent Aff. ¶ 11, and because ECMC has stipulated that Jacobson meets Prong 3, Resp't's Answer to Pet'r's Compl. ¶ 17, Jacobson is exempted from detailing her considerable efforts to maximize her income.

B. Jacobson has medical testimony corroborating that her untreatable migraines are likely to persist, precluding her ability to work, for the repayment period.

Ohio courts hold that student loans can be discharged when a debtor's illness is (1) likely to persist for a significant portion of the repayment period, and (2) indicative of a certainty of hopelessness. *Oyler,* 397 F.3d at 386. Courts prefer, but do not require, corroborating medical evidence of illnesses. *Barrett*, 487 F.3d at 361.

Illnesses satisfy Prong 2 when they are likely to substantially interfere with a debtor's ability to find or maintain jobs for the foreseeable future. For example, the court held that Barrett met Prong 2 because his "long medical history and inability to work consistently indicate[d] a 'certainty of hopelessness.'" *Id.* The court concluded that his condition would prevent him from finding full-time employment for the foreseeable future. *Id.* at 362. Similarly, in *Hertzel* the court held that a woman with a medical diagnosis of multiple sclerosis ("MS") met Prong 2 even though she could theoretically work between flare-ups. 329 B.R.at 230. The court reasoned that the certainty that the flare-ups would continue and the likelihood that they would increase over time would bar her from doing materially better, observing that MS is a progressive disease and that "even if she does not get worse . . . she is not going to get any better." *Id.; see also Cekic-Torres*, 431 B.R. at 794 (noting that "given her [conditions], and related physical difficulties, the Court is persuaded that the Debtor's prospects for future employment are . . . bleak.").

In contrast, Ohio courts hold that conditions that are normally temporary or that do not interfere with a debtor's ability to find or maintain work for the foreseeable future do not satisfy Prong 2. For example, in *Morrow* the court held that the debtor's broken leg did not satisfy

Prong 2 because broken legs typically heal, and the debtor had presented no medical evidence that her injury was permanent. 366 B.R. at 779. The court also ruled that Tirch did not satisfy Prong 2, observing that it "was hard-pressed to discern . . . how her condition prevents her from working now, let alone in the future." *Tirch,* 409 F.3d at 682. Trying to gauge the impact of her alleged disability, the court asked Tirch when she would be able to return to work: she replied with fatal candor, "Not at this time . . . [i]t could be a year, it could be two years." *Id.* at 681.

Unlike the debtors in *Morrow* and *Tirch*, Jacobson's doctor has opined that Jacobson is unable to work given the frequency and severity of her migraines. Trent Aff. ¶ 11. Further, her doctor has diagnosed her with chronic migraines that do not respond to treatment. *Id.* at ¶¶ 10, 11. Therefore, unlike the debtor with the broken leg in *Morrow*, 366 B.R. at 779, Jacobson's condition is unlikely to improve: a diagnosis of chronic migraines portends future migraines that are more easily triggered and more severe, Oliver & Taylor, *Treatment-resistant Migraines*, at 5.

Similar to *Hertzel*, even if Jacobson's condition does not get worse, it is not going to get better. *Id.* Like *Cekic-Torres,* she has lost jobs due to her illness and her future job prospects are bleak. Jacobson Aff. ¶ 14. Jacobson already spends half the month paralyzed by migraines, Trent Aff. ¶¶ 9, 10, and, even if her migraines do not worsen, in her current condition she is unlikely to find a job that can accommodate her. As in *Barrett,* her inability to work consistently indicates a certainty of hopelessness. Therefore, the Court should find that Jacobson meets Prong 2 because her migraines are likely to persist, precluding her ability to work, for the repayment period.

1. Jacobson's incurable migraines are distinguishable from her treatable depression.

In an attempt to paint Jacobson's condition as temporary, ECMC may try to conflate Jacobson's incurable migraines with her temporary stress and treatable depression. Jacobson does not dispute that psychological issues—like stress and depression—can trigger migraines.

Oliver & Taylor, *Treatment-resistant Migraines*, at 3. However, ECMC's argument fails to address the fact that temporary stresses can trigger incurable migraines. *Id.* at 5. In Jacobson's case, compounding stress led to chronic migraines. *See id.*; *see also* Trent Aff. ¶¶ 9, 10; Jacobson Aff. ¶¶ 3-5, 9, 10. Yet, Jacobson's migraines persist even though she has been free of their precipitating stresses for nearly two years. *See id.* at ¶¶ 11-13, 15, 16. Indeed, her inability to treat or manage her chronic migraine pain points to central sensitization, a condition for which there is no treatment, and which instead portends more easily triggered, more severe migraines. *See* Trent Aff. ¶¶ 9-11; Oliver & Taylor, *Treatment-resistant Migraines*, at 5. As in *Hertzel*, even if Jacobson's migraines do not get worse, they are not going to get any better.

CONCLUSION

Sasha Jacobson's incurable, untreatable migraines satisfy Prong 2 of the *Brunner* test because they prevent her from finding or maintaining employment, and will likely continue to do so for the remainder of the repayment period. Because ECMC has stipulated to Prongs 1 and 3, Jacobson respectfully requests that the Court grant her Motion for Summary Judgment and grant a discharge of her student loan debt.

Respectfully submitted,

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